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No. 08-___0 8 1 1 7 3 MAR 19 2009

IN THE

Supreme Court of the United States

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Petitioner,

v.

DALLAS AREA RAPID TRANSIT,
Respondent,

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court held in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982), that a union does not have a federal cause of action to sue in federal court to enforce the provisions of a "Section 13(c)"[1] arrangement and a collective bargaining agreement negotiated pursuant to such arrangement against a local transit authority under the Urban Mass Transit Act of 1964, as amended, 49 U.S.C.A. § 1609(c)("UMTA").[2] *Jackson Transit Authority* held that any such suit must be filed under state law. The Texas Supreme Court held in *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338,* 273 S.W.3d 659, 2008 WL 5266379 (Tex. 2008) that Texas governmental immunity law is not preempted by Section 13(c) of UMTA and therefore the local transit authority (Dallas Area Rapid Transit) is immune from a breach of contract suit filed by a union in state court regarding an alleged violation of the parties' 13(c) arrangement. The questions presented are:

1. Whether the decision of the Texas Supreme Court conflicts with the decision of the United States Supreme Court in *Jackson Transit Authority*?

2. Whether federal preemption applies to Texas state immunity law that otherwise would bar a union's state court suit against a governmental entity for alleged violations of a Section 13(c) arrangement?

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[1] Section "13(c)" is now codified under section 5333(b) of the Transportation Code.

[2] UMTA is now known as the Federal Public Transportation Act, as amended.

3. Whether UMTA gives a union the right to pursue a contract action in state court, regardless of state law that provides governmental entity immunity from suit, for alleged violation of a Section 13(c) arrangement and agreements reached pursuant to the Section 13(c) arrangement?

4. Whether the Court in *Jackson Transit Authority* intended the "right" to "pursue a contract action in state court" merely meant that the union could file suit, subject to summary dismissal because of governmental immunity, or whether the Supremacy Clause dictates that 13(c) arrangements and agreements reached pursuant to those arrangements can both be **filed** and **considered on the merits** in state court?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties before the Texas Supreme Court and this Court are Amalgamated Transit Union Local No. 1338 (petitioner before this Court, respondent before the Supreme Court of Texas) and Dallas Area Rapid Transit (respondent before this Court, petitioner before the Supreme Court of Texas). To Petitioner's knowledge, Dallas Area Rapid Transit and Amalgamated Transit Union Local No. 1338 have no parent corporations owning 10% or more of the corporations' stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amalgamated Transit Union Local No. 1338 respectfully submits this petition for a writ of certiorari to review the opinion of the Supreme Court of Texas.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is published as *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 2008 WL 5266379 (Tex. 2008). Pet. App. 1a. The opinion of the Court of Appeals for the Fifth District of Texas is published as 173 S.W.3d 896 (Tex.App. Dallas, 2005). Pet. App. 24a. The Judgment of the Court of Appeals for the Fifth District of Texas is attached in the appendix. Pet. App. 33a. The Order denying

DART's motion for rehearing before the Court of Appeals for the Fifth District of Texas is attached in the appendix. Pet. App. 34a. The unpublished order of the District Court, 191st Judicial District, Dallas County, Texas, the Hon. Catharina Haynes, February 1, 2005, Cause No. 04-06740-J, is attached in the appendix. Pet. App. 35a. Excerpts of the record, relevant for the Court's review of this petition for certiorari, are also contained in the Appendix. Pet. App. 37a-168a.

JURISDICTION

The Supreme Court of Texas entered its opinion and judgment on December 19, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Supremacy Clause within Article VI of the U.S. Constitution provides, in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

UMTA provides in relevant part:

> As a condition of financial assistance under sections . . . of this title, the interest of employees affected by the assistance shall be protected under arrangements the secretary of Labor con-

> cludes are fair and equitable . . . . Arrangements under this subsection shall include provisions that may be necessary for – (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (B) the continuation of collective bargaining rights . . . .

49 U.S.C. 5333(b).

STATEMENT OF THE CASE

Petitioner Amalgamated Transit Union Local No. 1338 ("ATU 1338") is a labor organization that represents employees of Dallas Area Rapid Transit ("DART"). DART is a regional transportation authority organized and existing under Texas Transportation Code, Chapter 452. ATU 1338 and DART are parties to a Section 13(c) arrangement under the Urban Mass Transportation Act, 49 U.S.C. §5333(b) ("UMTA").

This Court previously discussed UMTA, Section 13(c) protective arrangements, and the legislative history behind UMTA in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982). When UMTA was drafted, in approximately 1963, Congress was aware that several financially suffering private mass transportation companies across the country were being purchased by local governments and those local governments needed assistance from the federal government. *Jackson Transit Authority*, 457 U.S. at 17. At the same time, Congress recognized that as those private companies were purchased by public entities, the existing collective bargaining rights of the mass transit employees were at risk because several states

had anti-collective bargaining laws for public employees. *Id.* Congress recognized the importance of preserving and protecting the existing and future rights of those employees to continue collective bargaining in a way that would still allow the federal government to provide financial assistance to the local governments. *Id.*

Due to this concern, and to prevent federal funds from being used to destroy collective bargaining, Congress included Section 13(c) in UMTA. *Id.* Section 13(c), now 49 U.S.C. 5333(b), requires a state or local government to make arrangements to preserve transit workers' rights for that entity to receive federal assistance pursuant to §5307 *et seq.* of the Act. *Id.* at 15. Subject to a Section 13(c) arrangement, DART receives millions of dollars in federal grants every year from the Federal Transit Authority ("FTA") and must remain eligible for federal funding by submitting annual Certifications and Assurances to the FTA stating that DART acknowledges its compliance with 49 U.S.C. 5333(b). *See*, Fed. Register, Vol. 69, No. 10 at 2458, #3 Private Mass Transportation Companies. Pet. App. 165a. The 13(c) arrangement between DART and ATU 1338, is the parties' protective arrangement for purposes of satisfying the requirements of §5333(b), without which DART would be ineligible for federal funding under UMTA.

In April 2001, in accordance with the parties' 13(c) arrangement, ATU 1338 filed a "General Group Grievance" seeking improvements in wages and working conditions. In order to address the grievance, and pursuant to the parties' 13(c) arrangement, the parties met and conferred to address the grievance issues. The parties' 13(c) arrangement, consistent with Texas law, does not permit collective bar-

gaining between DART and the union. In place of collective bargaining, the 13(c) arrangement requires DART to meet and confer about proposed changes or modifications to wages and working conditions, through a "general grievance" process. That process, like collective bargaining, fosters agreements between the parties to resolve disputes and to encourage labor peace. An agreement between DART and ATU 1338 may be reached before or after "fact finding." Non-binding fact finding is included in the general grievance process to encourage the parties to reach agreements. If the parties fail to reach an agreement, DART makes the final decision. State law does not provide for interest arbitration and does not permit strikes by public employees.

Through the meet and confer sessions, in June 2002 DART and ATU 1338, without fact finding, reached certain agreements and entered into a General Grievance Resolution ("Resolution Agreement") that the parties ratified and signed. Pet. App. 48a. The Resolution Agreement resolved the parties' labor dispute and, among other things, provided for annual 4% salary and wages increases for operating employees in October 2001, October 2002, and October 2003 and stated that DART would not make any unilateral changes to the parties' Hourly Employment Manual ("HEM") except for issues not addressed within the Resolution Agreement. *Id.*

In September 2003, the DART Board of Directors approved DART's 2003-2004 budget but did not provide for the 4% general pay increase required by the parties' Resolution Agreement. DART also made several unilateral changes to the HEM.

Alleging that DART had violated the 13(c) arrangement and the Resolution Agreement reached

pursuant to the 13(c) arrangement, ATU 1338 filed suit in district court in Texas in July 2004. Pet. App. 37a. ATU 1338 asserted that its breach of contract action in state court was in conformity with *Jackson Transit Authority* as previously ruled upon in *Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870 (Tex. App. Dallas, 1992, *writ denied*). Pet. App. 41a. DART filed a plea to the jurisdiction, seeking dismissal of the suit based upon DART's state governmental immunity. Pet. App. 68a.

On November 16, 2004, the District Court heard DART's plea to the jurisdiction and requested additional briefing from the parties regarding whether or not the Supremacy Clause of the United States Constitution would in any way preempt DART from being able to claim governmental immunity when ATU 1338 brought suit in state court to enforce the parties' 13(c) arrangement. On December 17, 2004, ATU 1338 timely filed its supplemental briefing to the district court regarding the issue of federal preemption. Pet. App. 134a. The trial court denied DART's plea to the jurisdiction in an order signed by district court judge, Catharina Haynes, on February 1, 2005.[1]

DART took an interlocutory appeal to the Texas Fifth District Court of Appeals. Before the appellate court, preemption was the central issue. On October 14, 2005, Justices Whittington, Francis, and Lang entered an opinion and judgment denying DART's plea to the jurisdiction. Pet. App. 24a. The Court of Appeals decision quoted extensively from *Jackson Transit Authority* in determining that UMTA "preempts state governmental immunity law in this case." Pet. App. 26a and 31a.

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[1] Judge Haynes now sits on the United States Court of Appeals for the Fifth Circuit.

Relying upon this Court's precedent, the Court of Appeals held that federal law impliedly preempts state law if it is impossible for a private party to comply with both state law and federal requirements or if state law obstructs accomplishing and executing Congress's full purposes and objectives. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000) Pet. App. 31a. The Fifth District Court of Appeals noted that in Texas, state law prohibits collective bargaining by government employees but that DART is a party to an, "Arrangement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964," under which DART agreed the "existing rights of employees covered by this Arrangement to present grievances concerning their wages, hours of work, or conditions of work, individually or through a representative . . . shall be preserved and continued." Pet. App. 28a. The Court of Appeals then held that pursuant to *Jackson Transit Authority*, ATU 1338 may bring a contract action in state court to enforce the 13(c) arrangement that has been allegedly breached by DART. Pet. App. 31a. The Court of Appeals' holding regarding preemption was explicit:

> Assuming state law provides that DART, as a governmental entity, is immune from suit, this immunity would obstruct accomplishing and executing Congress's full purposes and objectives under the UMTA. *See Geier*, 529 U.S. at 882, 120 S.Ct. 1913. The UMTA, as interpreted in *Jackson Transit Authority*, is clear: state law is to control labor relations between local governments and unionized transit workers, as long as the workers' collective-bargaining rights are preserved before a local government receives federal aid. *See Jackson Transit Auth.*, 457 U.S. at 17, 27, 102 S.Ct. 2202. Congress designed section

> 13(c) of the UMTA "as a means to accommodate state law to collective bargaining." Although section 13(c) may be narrowly drafted to minimize its effects on state labor law, Congress's clear intent was to preserve collective-bargaining rights. Where state immunity law would preclude enforcement of the rights preserved under section 13(c), Congress' objectives could not be accomplished. Therefore, state immunity law "is preempted and has no effect."

Pet. App. 31a. DART sought rehearing before the Texas Court of Appeals. On October 31, 2005, DART's motion for rehearing was denied. Pet. App. 34a.

DART appealed to the Supreme Court of Texas. Oral arguments were held on November 17, 2007. On December 19, 2008, the Supreme Court of Texas reversed the Texas Court of Appeals and dismissed the union's suit based upon Texas governmental immunity and the Supreme Court of Texas' interpretation of *Jackson Transit Authority* and UMTA. The Texas Supreme Court based its jurisdiction to hear the interlocutory appeal upon its determination that the Texas Court of Appeals' decision conflicted with this Court's decision in *Jackson Transit Authority*. The Texas Supreme Court held that, contrary to the ruling of the appellate court, *Jackson Transit Authority* did not touch upon the issue of federal preemption and Texas governmental immunity law was not preempted by UMTA. Pet. App. 14-15a. Interpreting UMTA and *Jackson Transit Authority*, the Supreme Court of Texas ruled that a 13(c) arrangement can meet the requirements of section 13(c) without any availability of judicial enforcement thereof, and thus, that nothing in UMTA preempts state immunity law. Pet. App. 23a. The Supreme Court of

Texas determined that ATU 1338's mechanism for "enforcing" the parties 13(c) agreement, and general grievance agreements reached pursuant to the parties 13(c) agreement, is to "simply file another general grievance," and that this is sufficient under UMTA. Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

I. The Texas Supreme Court Decision Conflicts with the United States Supreme Court Decision in a Manner that Impacts Federal Law

A writ of certiorari is important in this case to determine whether the decision of the Supreme Court of Texas conflicts with the decision of this Court in *Jackson Transit Authority*. The Texas Supreme Court decision rests upon its interpretation of the Supremacy Clause, *Jackson Transit Authority*, and UMTA. The Supreme Court of Texas' opinion regarding these matters directly conflicts with the trial court decision and the Texas Court of Appeals decision, both of which squarely held that federal preemption and *Jackson Transit Authority* defeated DART's plea of state governmental immunity. The Supreme Court of Texas would concede that if the Texas Court of Appeals decision is correct, the decision of the Supreme Court of Texas directly conflicts with this Court's decision in *Jackson Transit Authority*.

The Texas Supreme Court based its jurisdiction to hear the interlocutory appeal by DART upon the premise that the court of appeals' decision conflicts with Section 13(c) of UMTA and *Jackson Transit Authority*. Pet. App. 14-15a. The Supreme Court of Texas held that it had jurisdiction over the interlocu-

tory appeal because it "possesses the power, and thus the duty, to correct a decision of a Court of Civil Appeals that conflicts with the 'supreme law of the land' as established by Congress and Supreme Court of the United States." Pet. App. 13-14a. The Supreme Court of Texas acknowledged it has been nearly thirty years since it has invoked its constitutional jurisdiction to remove an alleged conflict between a Texas appellate court and the United States Supreme Court. Pet. App. 14a, citing to *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979).

The Supreme Court of Texas summarized *Jackson Transit Authority* and ruled upon the issue of federal preemption by stating:

> [i]n *Jackson Transit Authority*, the public transportation authority in Jackson, Tennessee had a 13(c) arrangement that guaranteed its employees' collective-bargaining rights, but the authority later refused to abide by a collective-bargaining agreement. The union sued the authority in federal court for breach of both the 13(c) arrangement and the collective-bargaining agreement, but the district court dismissed the suit for want of subject-matter jurisdiction. The court of appeals reversed, holding the district court had federal-question jurisdiction because the union's claim arose under the laws of the United States, and additionally, that section 13(c) implicitly provides for a federal cause of action. The Supreme Court agreed that the district court had federal-question jurisdiction but held that section 13(c) did not create a federal cause of action for breach of either the 13(c) arrangement or the collective-bargaining agreement.

Pet. App. 16a.

The Supreme Court of Texas then addressed and rejected the argument of ATU 1338 that had been accepted by the appellate court:

> ATU 1338 argues that the right to sue a transportation authority to enforce its agreements is implicit in the Supreme Court's opinion. The court of appeals agreed with ATU 1338, but we think both DART's and ATU 1338's arguments read far too much into the Supreme Court's opinion. **The issue of federal preemption of state immunity law was simply not presented in the case, and we do not think the Supreme Court would have resolved it merely by implication.** Even if we were mistaken about the Supreme Court's intention, **we see no way to infer from its opinion what view it might take of the preemption issue.** The court of appeals' decision is inconsistent with *Jackson Transit Authority* because the court of appeals read the opinion in that case to decide the preemption issue in the present case.

Pet. App. 19a (emphasis added). Thus: (1) the Texas court of appeals decided that this Court's decision in *Jackson Transit Authority* ruled the union has a right under 13(c) to sue a transportation authority in state court to enforce its agreements and implicitly held that the Supremacy Clause preempted state immunity law. (2) The Texas Supreme Court held the opposite—that *Jackson Transit Authority* does not implicitly hold that state immunity law is preempted when the union brings a 13(c) suit against a transportation authority in state court.

The Supreme Court's opinion in *Jackson Transit Authority* discussed the Congressional history and intent in the passage of UMTA at great length. The

following passages from *Jackson Transit Authority* are relevant to this petition, and show that the Texas Supreme Court's decision conflicts with this Court's holding:

> . . . Congress was aware that public ownership might threaten existing collective-bargaining rights to unionized transit workers employed by private companies. If for example, state law forbade collective bargaining by state and local government employees, the workers might lose their collective bargaining rights when a private company was acquired by a local government. To prevent federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included §13(c) in the Act. Section 13(c) requires, as a condition of federal assistance under the Act, that the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interest of employees affected by [the] assistance." The statute lists several protective steps that must be taken before a local government may receive federal aid; among these are the preservation of benefits under existing collective-bargaining agreements and the continuation of collective bargaining rights.

457 U.S. at 17-18 (citations omitted).

> Because of the importance of the interpretation of §13(c) for local transit labor relations, we granted certiorari.

457 U.S. at 20.

> Indeed, since §13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective-bargaining

> agreements between those parties, it is reasonable to conclude that Congress expected the §13(c) agreement and the collective bargaining agreement, like ordinary contracts, to be enforceable by private suit upon breach.

457 U.S. at 20-21.

The Court plainly stated that a union may pursue (not just file) a suit in state court to enforce 13(c) arrangements and collective bargaining agreements created pursuant to those arrangements, by stating in text: "The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts." 457 U.S. at 29. The Court added:

> **The union, of course, can pursue a contract action in state court.** In addition, the Federal Government can respond by threatening to withhold additional financial assistance.

Id., n.13 (emphasis added). Concurring justices Powell and O'Connor added opinions that cut completely against the reasoning of the Supreme Court of Texas—that *Jackson Transit Authority* gives a right to sue in state court, but does not hint that the suit may be pursued in the face of a claim of governmental immunity:

> Congress here provided for the making of contracts that it must have intended to be enforced.

457 U.S. at 30 (Powell and O'Connor, concurring).

This Court, in *Jackson Transit Authority*, held that in passing UMTA, Congress intended that private parties to §13(c) protective arrangements could "of course" sue in state court to enforce the §13(c) arrangements and collective bargaining contracts reached pursuant to the §13(c) arrangement. The

Supreme Court of Texas, in disagreeing with the trial court and the unanimous decision of the Fifth District Court of Appeals, has ruled that *Jackson Transit Authority* made no such implicit holding and that the union's suit must be dismissed outright due to governmental immunity. The Texas Supreme Court opined that this Court in *Jackson Transit* would not have resolved the immunity issue by implication and added emphatically "we see no way to infer from its opinion what view it might take of the preemption issue." Pet. App. 19a. If Appellant, the district court and the appeal courts in Texas are right, and *Jackson Transit* necessarily implies that immunity is overcome when it states that "[t]he union 'of course' can pursue a contract action in state court," there is a direct and important conflict between this Court's holding in *Jackson Transit Authority* and the Texas Supreme Court decision in this case. Granting the writ of certiorari is appropriate.

II. In the Alternative, if *Jackson Transit Authority* Did Not by Implication Hold That State Immunity Law Is Preempted When a Union Pursues a Breach of Contract Action Over a 13(c) Matter in State Court, the Unresolved Issue Is an Important Federal Question that Should be Settled by the Supreme Court and the Holding of the Supreme Court of Texas is Repugnant to the Constitution and Laws of the United States.

The Texas Supreme Court opines that while the *Jackson Transit Authority* decision stated that a union could, "of course, pursue a contract action in state court," this Court by implication offered that it might

permit a public transit company to plead immunity so the suit would be summarily dismissed.

A. This is an Important Federal Question That the Court Should Settle

If the Supreme Court of Texas correctly held that *Jackson Transit Authority* did not provide unions the right to sue in state court (unfettered by governmental immunity) for breach of a 13(c) arrangement and the Resolution Agreement reached pursuant to the 13(c) arrangement, a writ of certiorari is fully appropriate. This Court should determine whether Congress intended for parties to §13(c) arrangements to have enforceable rights somewhere. Did Congress mean for the "right" to sue in state court to be a worthless Catch-22, where the union's suit would be summarily dismissed due to state court immunity law? This Court should determine whether 13(c) arrangements and agreements reached pursuant to those arrangements can both be filed and **considered on the merits** in state court—whether the Supremacy Clause of the Unites States Constitution preempts any state governmental immunity laws for such suits.

The impact of the Supreme Court of Texas' holding in this matter is likely to be felt in every state within the nation that has governmental transit authorities that receive federal funding pursuant to UMTA. In 2007, the Federal Transit Authority (FTA) obligated approximately $10.5 billion dollars in federal funds to states and territories for transit needs. All fifty states received federal funding through the FTA for transit.[2] Texas ranked 6th among states receiving

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[2] For a state-by-state breakdown of 2007 FTA funding obligations, *see*: http://www.fta.dot.gov/documents/TABLE_6_OBLIGATIONS_BY_PROGRAMS_AND_STATES.xls

federal FTA transit funds, and received approximately $486.6 million dollars in 2007.

Even if states do not currently have governmental immunity provisions that mirror Texas law, there is nothing to prevent state governments from enacting similar laws. The Supreme Court of Texas defines the terms of 13(c) arrangements for governmental entities in Texas. Public transit authorities in Texas may enter into 13(c) arrangements to get federal funds and avoid enforcement of those arrangements and the agreements that flow from them by invoking state law governmental immunity. Logic indicates that other states will want the Texas deal. The intent of Congress is at stake.

B. The Holding of the Supreme Court of Texas is Repugnant to the Constitution and Laws of the United States

The Texas Supreme Court has held that while *Jackson Transit Authority* says that unions have the right to sue transit authorities in state court to remedy breaches of Section13(c) arrangements and agreements reached pursuant to Section 13(c) arrangements, *Jackson Transit Authority* did not implicitly hold that unions may maintain their suits if faced with a plea of immunity under state law. The Texas Supreme Court concluded that despite *Jackson Transit Authority* and UMTA, there is no preemption of Texas state laws that prevent governmental agencies such as DART, from being sued for breach of contract. Therefore, in Texas, if a transit authority such as DART breaches a 13(c) arrangement or an agreement reached between the parties through the meet and confer process created by and dictated in the 13(c) arrangement, the union can sue the public entity, but the suit will be summarily dismissed based

upon Texas governmental immunity law. Whether read broadly where immunity bars all state court suits by unions to enforce 13(c) rights or more narrowly to bar suits as to some 13(c) claims, the ruling is repugnant to the Constitution and laws of the United States.

The first reported decision that interprets the decision of the Texas Supreme Court reads it as a sweeping judicial pronouncement that immunity bars any suit against the public entity to enforce Section 13(c) rights. Senior United States District Judge A. Joe Fish did not consider whether the Texas Supreme Court "got it right," and stated:

> One might conclude that in order to enforce [13c] arrangements, the transit authority must be subject to suit. The Texas Supreme Court, however, has already addressed this exact issue in *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, ____ S.W.3d ____, 2008 WL 5266379, *7 (Tex. Dec. 19, 2008). There, the plaintiff argued that "by preventing suit to enforce the [arrangement], state immunity law stands as an obstacle to achieving the full purpose of section 13(c) to protect transit employees' interest." *Id.* at *8. The court disagreed, holding that transit employees can protect their interest through an administrative process. *Id.* Thus, where the section 13(c) arrangement provides for an administrative process to enforce the details of that arrangement, the state agency remains immune from suit. *Id.* at 9.

Lindsey v. Dallas Area Rapid Transit, et al., 2009 WL 453769 (N.D. Tex. 2009)(Civ. Action No. 3:08cv1096, Feb. 23, 2009).

A close reading of the Texas Supreme Court decision suggests a nuanced (and implausible[3]) holding, based on the perception of the Texas Supreme Court of the intent of Congress, that some suits against a public entity to enforce Section 13(c) rights would not be barred by immunity. In Part III of its decision, the Texas Supreme Court appears to accept DART's concession that DART would not be immune from suit by ATU 1338 "to require that the grievance procedures laid out in the Arrangement be followed . . . [i]f for example DART refused to provide the hearing called for, or to engage in the prescribed fact-finding process, DART acknowledges that ATU 1338 could sue to enforce the Arrangement." Pet. App. 20a. The Texas Supreme Court then discusses the intent of Congress, opining "section 13(c) requires only that a transportation authority make arrangements that 'the Secretary of Labor concludes are fair and equitable.'" Pet. App. 21a. The general grievance scheme is designed to foster labor peace and to encourage and assist the parties to reach agreements, even though

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[3] It seems implausible that DART would be immune from some 13(c) suits by the union and not others. One would think DART is either entirely immune, or that it is not immune; that there either is or is not preemption. But the Texas Supreme Court decision suggests that DART would not be immune from suit if DART refused to meet with the union, despite being required to do so by the 13(c) arrangement's required general grievance process. The Texas Supreme Court then also implausibly (in light of the purpose of Section 13(c)) holds that where the process "works" and the parties reach an agreement as a result of the meetings, the Union may not sue to enforce the agreement. In other words, because DART will go through the motions and meet with the union and because the union can engage in a futile series of meetings, agreements reached, breaches of agreements, and new grievances, DART is immune from suit.

absent an agreement, DART has the final say. The end result of the general grievance scheme is either: (1) an agreement, or (2) no agreement and DART has the final say. The Texas Supreme Court missed the point of the general grievance scheme. Instead, it observed (as if agreement would not happen) that the "end result" of the fact-finding process is a non-binding report and recommendation. Pet. App. 21a.

Next, the Texas Supreme Court delves into the merits of the union's suit against DART, interpreting the Grievance Resolution to be non-binding, so that a violation of the agreement by DART merely provides as a "remedy" that ATU 1338 may file another general grievance ahead of schedule.[4] Pet. App. 23a. The Texas Supreme Court rules that judicial enforcement of the agreement reached via the general grievance process is not protected from immunity by preemption because a satisfactory arrangement exists so long as the union has a right to file another grievance, even though any agreement reached pursuant to the new grievance will also be unenforceable. *Id.*

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[4] The Texas Supreme Court misstates the language of the Resolution Agreement—that if DART fails to abide by the agreement "the consequence would **only** be to relieve ATU 1338 of a commitment to a moratorium on filing general grievances." Pet. App. 22a, (emphasis added). This is a merits issue, and ATU 1338's merits position is that the language addressed (which does not include the word "only") relieves the union of the moratorium commitment, but that judicial enforcement under *Jackson Transit Authority* is also available. On the merits (*i.e.*, after the suit proceeds despite a claim of immunity), DART can point to language about DART's position that it cannot not enter into contracts and the union can point to the fact that the language does not state the union agrees with DART's position and other language that supports an enforceable contract.

The Texas Supreme Court finds that Congress' intent is met by a circular process under which the union can keep filing general grievances, keep getting "agreements," and DART can break any of those agreements with impunity (due to immunity). The Texas Supreme Court finds this is "fair and equitable" since the union can always file another grievance. Building on its earlier finding that *Jackson Transit Authority* does not implicitly permit a union both to sue and to maintain the suit despite a plea of governmental immunity, the Texas Supreme Court holds: "Given that an arrangement can meet the requirements of section 13(c) without providing for judicial enforcement of grievance resolutions, nothing in the statute implicitly preempts state immunity law." *Id.* This conclusion would provide as "fair and equitable" a cynical system where agreements mean nothing but false promises and the "remedy" is to file another futile grievance. Instead of fostering labor peace and agreements, the process the Texas Supreme Court finds adequate in place of judicial enforcement would make the general grievance process a frustrating and time-consuming hoax. Agreements would not be worth pursuing. Talks would not be worth conducting. Agreements would not be agreements. Such a holding misstates the intent of Congress and is repugnant to UMTA and the Supremacy Clause.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 19, 2009

APPENDIX

APPENDIX A

SUPREME COURT OF TEXAS.

No. 06-0034

DALLAS AREA RAPID TRANSIT,
Petitioner,

v.

AMALGAMATED TRANSIT UNION LOCAL No. 1338,
Respondent.

Argued Nov. 14, 2007.
Decided Dec. 19, 2008.

Justice HECHT delivered the opinion of the Court.

Section 13(c) of the federal Urban Mass Transit Act of 1964 (the "UMTA", now the Federal Transit Act) conditions a public transportation authority's receipt of federal financial assistance on "arrangements the Secretary of Labor concludes are fair and equitable" to protect "the interests of employees affected by the assistance".[1] Such arrangements "shall include provisions that may be necessary for . . . the preservation

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[1] Pub.L. No. 88-365, § 10(c), 78 Stat. 302, 307, redesignated as § 13(c) by Pub.L. No. 89-562, § 2, 80 Stat. 715, 716, as amended, now codified at 49 U.S.C. § 5333(b) (2006) ("As a condition of financial assistance under . . . this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance . . . shall specify the arrangements.").

of rights, privileges, and benefits . . . [and] the protection of individual employees against a worsening of their positions related to employment".[2]

In this case, a public transportation authority and its employees' union, operating under a 13(c) arrangement, resolved a general grievance over wages and benefits. The authority did not adhere to the resolution, and the union sued for breach of contract. The lower courts concluded that the authority is not immune from suit.[3] The issue before us is whether section 13(c) preempts an authority's immunity from suit under state law. We hold that immunity is not preempted and that the union's recourse is to the procedures approved in the 13(c) arrangement. Accordingly, we reverse the judgment of the court of appeals and dismiss the case.

I

Petitioner Dallas Area Rapid Transit is a regional public transportation authority[4] that performs only

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[2] *Id.* § 5333(b)(2) ("Arrangements under this subsection shall include provisions that may be necessary for-(A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (B) the continuation of collective bargaining rights; (C) the protection of individual employees against a worsening of their positions related to employment; (D) assurances of employment to employees of acquired public transportation systems; (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and (F) paid training or retraining programs.").

[3] 173 S.W.3d 896, 900 (Tex.App.-Dallas 2005).

[4] *See* TEX. TRANSP. CODE §§ 452.001-.720.

governmental functions[5] and is immune from suit under Texas law.[6] Created in 1983 and funded with a one-cent sales tax,[7] DART assumed the operations of the Dallas Transit System, which the City of Dallas had acquired in 1963 from the privately owned Dallas Transit Company.[8] Company employees, and later System employees, were represented by Amalgamated Transit Union Local No. 1338, which now represents DART employees. ATU 1338 engaged in collective bargaining with the Company,[9] but Texas law prohibits a state political subdivision from collective bargaining with public employees.[10] This prohi-

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[5] *Id.* § 452.052(c) ("An authority is a governmental unit . . . and the operations of the authority are not proprietary functions for any purpose . . . .").

[6] *See Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 812-815 (Tex.1993) (treating a port authority with only governmental functions as a political subdivision of the State for purposes of governmental immunity).

[7] *See DART HISTORY, DALLAS AREA RAPID TRANSIT*, http://www.dart.org/about/history.asp (last visited October 31, 2008).

[8] *See Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 872 (Tex.App.-Dallas 1992, *writ denied*), *disapproved in part on other grounds by Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 445-446, n. 17 (Tex. 1994); *Amalgamated Transit Union Local 1338 v. Dallas Public Transit Bd.*, 430 S.W.2d 107, 109 (Tex.Civ.App.-Dallas 1968, *writ ref'd n.r.e.*), *cert. denied*, 396 U.S. 838, 90 S.Ct. 99, 24 L.Ed.2d 89 (1969).

[9] *See Local 1338*, 430 S.W.2d at 109-110.

[10] TEX. GOV'T CODE § 617.002("(a) An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees. (b) A contract entered into in violation of Subsection (a) is void. (c) An official of the state or of a political subdivision of the state may not recognize a labor organization as the bargaining agent

bition has been held to apply to the System,[11] DART,[12] and their employees, and ATU 1338 does not challenge its application here.[13] But public employees may "present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike,"[14] and ATU 1338 has presented grievances for DART employees.

DART receives federal financial assistance conditioned on a 13(c) Arrangement that was negotiated with ATU 1338 and approved by the Secretary of Labor on September 30, 1991. Attachment B to the 1991 Arrangement sets out "general grievance procedures

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for a group of public employees."), formerly TEX.REV.CIV. STAT. ANN. art. 5154c, first enacted by Act of April 17, 1947, 50th Leg., R.S., ch. 135, 1947 Tex. Gen. Laws 231.

[11] *Local 1338*, 430 S.W.2d at 113-114.

[12] *Stephens v. Dallas Area Rapid Transit*, 50 S.W.3d 621, 632-634 (Tex.App.-Dallas 2001).

[13] Similar governmental entities are treated as state political subdivisions. *See* TEX. GOV'T CODE § 791.003(5) ("In this chapter: . . . 'Political subdivision' includes any corporate and political entity organized under state law."); TEX. LOCAL GOV'T CODE § 335.075(a) (referring to "a political subdivision, including a metropolitan rapid transit authority created under Chapter 451, Transportation Code"); id. § 391.002(1) ("In this chapter: . . . 'Governmental unit' means a[n] . . . authority . . . or other political subdivision of the state."); TEX. NAT. RES. CODE § 11.082(d)(4) ("In this section: . . . 'Political subdivision' means a . . . special-purpose district or authority."); TEX. TRANSP. CODE § 228.251(2) ("In this subchapter: . . . 'Local governmental entity' means a political subdivision of the state, including . . . a transportation corporation created under Chapter 431."); id. § 366.003(8) (same); id. § 370.003(8) (same); id. 370.032(a) ("[A regional mobility authority] is a body politic and corporate and a political subdivision of this state.").

[14] TEX. GOV'T CODE § 617.005.

. . . for the purpose of giving an employee, individually or through such employee's representative, the opportunity to present grievances and appeals regarding establishment of, or failure to establish, specified wages, hours or conditions of work". For our purposes, those procedures may be summarized as follows:

> General grievances must be presented in writing to the human resources department head, who must meet with the employee or representative, provide a full hearing and review, and issue a written decision.
>
> The employee or representative may appeal to the executive director or invoke a fact-finding process.
>
> The fact-finding process is conducted by a three-member panel. One member is selected by each side, and the third is selected from a list of neutrals. After gathering facts, conducting hearings, and considering the opposing positions, the panel must issue a written report, making recommendations on unresolved issues.
>
> If the panel is unanimous, "the recommendations shall be deemed agreed upon as a final resolution of the issues submitted, except as otherwise modified by the parties' mutual agreement." But either partisan member of the panel may dissent. The panel must publish its findings and recommendations, and any dissents, in the local media.
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> "[T]he fact-finding report and recommendations shall be advisory only" and shall not be binding on either party.[15]

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[15] The clause adding that the report and recommendations "shall not be binding" appears in DART's Hourly Employment Manual.

The provisions of Attachment B, with minor changes, were included as section 8.10 of DART's Hourly Employment Manual.

In April 2001, ATU 1338 filed a general group grievance on behalf of DART employees seeking wage increases and better benefits. The grievance did not result in a fact-finding panel report under the Attachment B procedures; instead, DART and ATU 1338 signed a "General Grievance Resolution" in June 2002. The Resolution provided, among other things, that hourly employees would receive three annual 4% pay increases effective October 2001, October 2002, and October 2003. The Resolution stated that it "constitute[d] a final resolution to the issues raised in the General Grievance", barred ATU 1338 from filing another general grievance "concerning terms and conditions of employment, specified wages, hours, and conditions of work" for three years, and stated that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual except for those issues remaining open herein." But the Resolution also contained important reservations under the heading, "Management Rights":

> 1. DART, at its sole discretion, possesses the right in accordance with applicable laws, to manage all operations, including the direction of the working force and the right to plan, direct and control the operation of all equipment and other property of DART, except as modified by Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Texas Government Code and DART's 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991 pursuant to USC § 5333(b),

if applicable . . . . [N]othing herein changes DART's position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work. In the event that DART makes any unilateral change except for issues remaining open herein during the term of this Resolution, such change relieves Local 1338 of its commitment not to file a General Grievance from October 1, 2001 to September 30, 2004.

2. Matters of inherent managerial policy are reserved exclusively to DART under law. These include but shall not be limited to such areas of discretion or policy as the functions and programs of DART, standards of service, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel.

3. The listing of specific rights in this article is not intended to be, nor should be considered, restrictive or a waiver of any rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by DART in the past.

4. DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its 13(c) Arrangement and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees. This general grievance is therefore resolved subject to all the foregoing limitations.

DART gave its employees the pay raises in 2001 and 2002, but not in 2003, and it unilaterally reduced other benefits, asserting that declining sales tax revenues required cost-saving measures. ATU 1338 sued for breach of contract based on DART's failure to comply with the 2002 Resolution. ATU 1338 sought money damages and injunctive relief. DART filed a plea to the jurisdiction claiming governmental immunity, which the trial court denied. On DART's interlocutory appeal, the court of appeals affirmed, holding that section 13(c) of the UMTA, as interpreted by the United States Supreme Court in *Jackson Transit Authority v. Local Div. 1285*, Amalgamated Transit Union,[16] preempted DART's immunity from ATU 1338's suit:

> Assuming state law provides that DART, as a governmental entity, is immune from suit, this immunity would obstruct accomplishing and executing Congress's full purposes and objectives under the UMTA. The UMTA, as interpreted in *Jackson Transit Authority*, is clear: state law is to control labor relations between local governments and unionized transit workers, as long as the workers' collective-bargaining rights are preserved before a local government receives federal aid. Congress designed section 13(c) of the UMTA "as a means to accommodate state law to collective bargaining." *Jackson Transit Auth.*, 457 U.S. at 27, 102 S.Ct. 2202, 72 L.Ed.2d 639. Although section 13(c) may be narrowly drafted to minimize its effects on state labor law, Congress's clear intent was to preserve collective-bargaining rights. Where state immunity law would preclude enforcement of the rights

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[16] 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982).

preserved under section 13(c), Congress's objectives could not be accomplished. Therefore, state immunity law "is preempted and has no effect."[17]

We granted DART's petition for review.[18]

II

We begin with ATU 1338's argument that we lack jurisdiction over this interlocutory appeal. DART contends that we have jurisdiction because the court of appeals' decision conflicts with section 13(c) and Jackson Transit Authority. We first consider the extent of our jurisdiction and then how to apply it in this case.

A

Without an intermediate appellate court in Texas, this Court's workload soon became unmanageable.[19] The Constitution of 1876 limited the Supreme Court's appellate jurisdiction to civil cases and created a court of appeals for criminal cases and civil cases from county courts[20] but this did little to alleviate the burden.[21] To preserve a right of appeal that was both broad and effective, constitutional amendments

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[17] 173 S.W.3d 896, 900 (Tex.App.-Dallas 2005) (citations omitted).

[18] 50 Tex. Sup.Ct. J. 929 (June 29, 2007).

[19] *See* 1 GEORGE D. BRADEN *ET AL.*, *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 399 (1977).

[20] TEX. CONST. art. V, §§ 3, 6 (1876).

[21] *See* 1 BRADEN, *supra* note 19, at 365 ("Despite the transfer of all criminal jurisdiction and some civil cases to the court of appeals in 1876, the supreme court's docket remained overcrowded.").

adopted in 1891 restructured the judiciary.[22] The Supreme Court's jurisdiction remained limited to civil cases.[23] The court of appeals became the Court of Criminal Appeals, with jurisdiction over criminal cases only.[24] The Legislature was required to divide the State into separate judicial districts and establish in each district a court of civil appeals with appellate jurisdiction over all civil cases in that district,[25] thereby placing appellate courts closer to the litigants and relieving the burden on the Supreme Court. To ensure uniformity in the development of the civil law, the 1891 constitutional amendments gave the Supreme Court appellate jurisdiction over "questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Court of Civil Appeals may hold differently on the same question of law".[26]

The enabling legislation enacted in 1892 reflected this constitutional priority while shifting the burden of appellate caseloads to the intermediate courts. The Supreme Court's jurisdiction was limited to cases in which the Courts of Civil Appeals had rendered a final judgment, as opposed to remanding for further proceedings, but there were exceptions to that limitation for cases in which Supreme Court review even at an intermediate stage was important. Three excep-

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[22] *Id.* at 399 ("The supreme court was falling so far behind that either the right to appeal had to be severely curtailed or the system had to be radically revised.").

[23] TEX. CONST. art. V, § 3 (1891).

[24] *Id.* §§ 4-5.

[25] *Id.* § 6.

[26] *Id.* § 3

tions were for "[c]ases in which a civil court of appeals overrules its own decisions or the decision of another court of civil appeals or of the supreme court", "[c]ases in which the judges of any court of civil appeals may disagree", and "[c]ases in which any two of the courts of civil appeals may hold differently on the same question of law".[27] As we observed in 1895, these exceptions "were inserted for the purpose of enabling this court, upon the first opportunity, to settle questions of law upon which conflicting opinions were held by any of the courts having appellate jurisdiction,-so far, at least, as the opinion of this court can settle such questions".[28] Obviously, allowing conflicts in the law among the Courts of Civil Appeals to go unresolved could generate confusion that would offset the gains in efficiency those courts were designed to accomplish. The Supreme Court's jurisdiction was enlarged to provide for resolution of such conflicts. In 1913, the Court's jurisdiction was extended to all cases from the Courts of Civil Appeals, even if remanded,[29] and that remains the law.[30]

The 1892 legislation made decisions in a few types of cases final in the Courts of Civil Appeals, irrespective of conflicts among the courts. These were boun-

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[27] Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 14, § 1, 1892 Tex. Gen. Laws 19, 20, reprinted in 10 H.P.N. Gammel, *The Laws of Texas* 1822-1897, at 383, 384 (Austin, Gammel Book Co. 1898), formerly TEX.REV.CIV. STAT. ANN art. 1728 (1925).

[28] *Sturgis Nat'l Bank v. Smyth*, 87 Tex. 649, 30 S.W. 898, 898 (1895) (emphasis added).

[29] Act approved March 28, 1913, 33rd Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107, 107.

[30] Act approved March 28, 1913, 33rd Leg., R.S., ch. 55, § 1, 1913 Tex. Gen. Laws 107,107.

dary and election disputes, slander and divorce cases, interlocutory appeals, and cases within the constitutional county courts' jurisdiction except probate matters and cases involving revenue laws or the validity of a statute.[31] But by 1953, the Legislature had concluded that the Supreme Court's jurisdiction should extend to all cases "in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law".[32] That is the current law.[33]

Although the statutes governing this Court's jurisdiction have specifically addressed conflicts between our intermediate appellate courts and this Court, none has addressed conflicts between those courts and the United States Supreme Court. Such a conflict was presented in a 1979 divorce case, *Eichelberger v.*

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[31] Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 15, § 5, 1892 Tex. Gen. Laws 25, 26, reprinted in 10 H.P.N. Gammel, *The Laws of Texas* 1822-1897, at 389, 390 (Austin, Gammel Book Co. 1898), formerly TEX.REV.CIV. STAT. ANN art. 1821 (1925).

[32] Act of May 19, 1953, 53rd Leg., R.S., ch. 424, § 2, 1953 Tex. Gen. Laws 1026, 1027; *see State v. Wynn*, 157 Tex. 200, 301 S.W.2d 76, 77-78 (1957) (*per curiam*); *Cone v. Cone*, 153 Tex. 149, 266 S.W.2d 860, 861 (1954) (*per curiam*).

[33] TEX. GOV'T CODE § 22.225(c). Pursuant to a constitutional amendment adopted in a 1980 election, the courts of civil appeals were renamed courts of appeals, and given criminal jurisdiction in 1981. TEX. CONST. art. V § 6; Tex. S.J. Res. 36, 66th Leg., R.S., §§ 5, 7, 1979 Tex. Gen. Laws 3223, 3224-3225, 3226 (effective Sept. 1, 1981); Act of June 1, 1981, 67th Leg., R.S., ch. 291, §§ 101-102, 149, 1981 Tex. Gen. Laws 761, 801-802, 820 (amending TEX.CODE CRIM. PROC. arts. 4.01, 4.03, effective Sept. 1, 1981).

Eichelberger.[34] At that time, decisions in divorce cases were still final in the courts of civil appeals absent conflicts among Texas courts.[35] The court of civil appeals had held that federal law did not preempt a divorce court's division of future railroad retirement benefits between spouses.[36] While the case was pending in this Court, the United States Supreme Court reached the opposite conclusion.[37] Although there was no statutory basis for this Court to take jurisdiction of the case, we concluded that we were constitutionally required to do so:

> We hold that under Article V, Sections 1[38] and 3,[39] of the Constitution of Texas, the Supreme Court of Texas possesses the power, and thus the duty, to correct a decision of a Court of Civil Appeals that conflicts with the "supreme law of the

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[34] 582 S.W.2d 395 (Tex.1979).

[35] This finality was removed in 1987. Act of May 29, 1987, 70th Leg., R.S., ch. 1106, § 2, 1987 Tex. Gen. Laws 3804, 3804.

[36] *Eichelberger v. Eichelberger*, 557 S.W.2d 587, 589 (Tex.Civ.App.-Waco 1977), *rev'd and rendered in part and aff'd in part*, 582 S.W.2d 395 (Tex.1979).

[37] *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 585-586, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979).

[38] TEX. CONST. art. V, § 1 states in part: "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."

[39] *Id.* art. V, § 3 states in part: "The Supreme Court shall exercise the judicial power of the state except as otherwise provided in this Constitution . . . . Its appellate jurisdiction shall be final and shall extend to all cases except in criminal law matters and as otherwise provided in this Constitution or by law."

land"[40] as established by the Congress and Supreme Court of the United States.[41]

Consistent with the Supreme Court's decision, we reversed the judgment of the court of civil appeals in part and rendered judgment.[42]

In the nearly thirty years since we decided *Eichelberger*, we have not invoked our constitutional jurisdiction to remove a conflict between a Texas appellate court and the United States Supreme Court,[43] but we adhere to our holding that this Court has such jurisdiction. From 1892 to 1953, the decisions of the courts of civil appeals were final in some cases and not subject to this Court's review, but this Court has never lacked jurisdiction to prevent an intermediate appellate court from conflicting with one of this Court's decisions.[44] It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts.[45] We have

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[40] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[41] *Eichelberger*, 582 S.W.2d at 397.

[42] *Id.* at 403.

[43] *Cf. County of Dallas v. Sempe*, 262 S.W.3d 315, 315-316 (Tex.2008) (*per curiam*) (concluding that the court of appeals' decision did not conflict with a decision of the United States Supreme Court).

[44] Even if appellate jurisdiction were restricted, we have noted that such a conflict could be corrected by writ of mandamus. *State v. Wynn*, 157 Tex. 200, 301 S.W.2d 76, 78 (1957) (*per curiam*).

[45] *In re K.M.S.*, 91 S.W.3d 331, 331 (Tex.2002) (*per curiam*) ("[I]n reaching their conclusions, courts of appeals are not free

no less authority to ensure that the lower courts follows the United States Supreme Court.

Nor should our holding in *Eichelberger* apply with any less force in interlocutory appeals.[46] On the contrary, the fact that provision has been made for an interlocutory appeal indicates that the Legislature has determined that appellate review before a final judgment is important. It is surely no less important when a court of appeals' decision conflicts, not with another court of appeals' decision or a decision of this Court, but with a decision of the United States Supreme Court.

Accordingly, we conclude that we have jurisdiction over this case if the court of appeals's decision conflicts with the United States Supreme Court's decision in Jackson Transit Authority.

B

We turn, then, to the question whether such a conflict exists. A court of appeals holds differently from this Court "when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."[47] We use this same standard in determining whether the court of appeals in this case has held differently from the United States Supreme Court.

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to disregard pronouncements from this Court . . . . "); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex.1989) ("This court need not defend its opinions from criticism from courts of appeals; rather they must follow this court's pronouncements.").

[46] *Cf. In re H. V.*, 252 S.W.3d 319, 323 n. 26 (Tex.2008) (expressly refusing to reach the issue).

[47] TEX. GOV'T CODE § 22.001(e).

In *Jackson Transit Authority*, the public transportation authority in Jackson, Tennessee had a 13(c) arrangement that guaranteed its employees' collective-bargaining rights, but the authority later refused to abide by a collective-bargaining agreement.[48] The union sued the authority in federal court for breach of both the 13(c) arrangement and the collective-bargaining agreement, but the district court dismissed the suit for want of subject-matter jurisdiction.[49] The court of appeals reversed, holding that the district court had federal-question jurisdiction[50] because the union's claim arose under the laws of the United States, and additionally, that section 13(c) implicitly provides for a federal cause of action.[51] The Supreme Court agreed that the district court had federal-question jurisdiction[52] but held that section 13(c) did not create a federal cause of action for breach of either the 13(c) arrangement or the collective-bargaining agreement.[53]

Under Tennessee law, the Jackson Transit Authority was authorized to enter into collective-

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[48] 457 U.S. 15, 18-19, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982). The authority contended that the union's agreement was with the authority's former manager, not with the authority itself. Id. at 19 n. 3, 102 S.Ct. 2202; *see* Local Div. 1285, *Amalgamated Transit Union v. Jackson Transit Auth.*, 1990 Tenn.App. LEXIS 901, at *5-*9, 1990 WL 210310, at *2-*4 (Tenn.Ct.App. Dec. 26, 1990).

[49] 457 U.S. at 19, 102 S.Ct. 2202; 447 F.Supp. 88, 93-95 (W.D.Tenn.1977).

[50] 28 U.S.C. § 1331 (2006).

[51] 457 U.S. at 19-20, 102 S.Ct. 2202; 650 F.2d 1379, 1383 (6th Cir.1981).

[52] 457 U.S. at 21 n. 6,102 S.Ct. 2202.

[53] *Id.* at 29, 102 S.Ct. 2202.

bargaining agreements with its employees at the time its dispute with the union arose,[54] and the authority did not contend that it was immune from suit to enforce its agreements. Thus, the Supreme Court was not confronted with any issue of federal preemption of state governmental immunity. But DART and ATU 1338 argue that passages in the Supreme Court's opinion indicate its views on the subject. As DART points out, the Supreme Court emphasized that Congress intended section 13(c) arrangements and agreements under them to be governed by state law, not federal law:

> A consistent theme runs throughout the consideration of § 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law.[55]
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> * * *
>
> Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers. Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations.

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[54] *See* TENN.CODE ANN. §§ 7-56-101 to -109. Prior to 1971, when these statutes were enacted, one court had held in *Weakley County Mun. Elec. Sys. v. Vick*, 43 Tenn.App. 524, 309 S.W.2d 792 (1957), that a governmental entity could not engage in collective bargaining with its employees. *See* Local Div. 1285, 1990 Tenn.App. LEXIS 901, at *4, 1990 WL 210310, at *1.

[55] 457 U.S. at 24, 102 S.Ct. 2202.

> Congress intended that § 13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities. But Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.[56]

DART argues that federal law should not preempt state immunity law any more than state labor law. But as ATU 1338 points out, other passages contemplate state-court actions to enforce section 13(c) arrangements and agreements under them:

> Indeed, since § 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective-bargaining agreements between those parties, it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach . . . .
>
> The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts, but whether Congress intended such contract actions to set forth federal, rather than state, claims.[57]
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> * * *
>
> Given this explicit legislative history, we cannot read § 13(c) to create federal causes of action for

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[56] *Id.* at 27-28, 102 S.Ct. 2202 (footnotes and citation omitted).

[57] *Id.* at 20-21, 102 S.Ct. 2202 (citation omitted).

> breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions. The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.[58]

ATU 1338 argues that the right to sue a transportation authority to enforce its agreements is implicit in the Supreme Court's opinion.

The court of appeals agreed with ATU 1338, but we think both DART's and ATU 1338's arguments read far too much into the Supreme Court's opinion. The issue of federal preemption of state immunity law was simply not presented in the case, and we do not think the Supreme Court would have resolved it merely by implication. Even if we were mistaken about the Supreme Court's intention, we see no way to infer from its opinion what view it might take of the preemption issue. The court of appeals' decision is inconsistent with Jackson Transit Authority because the court of appeals read the opinion in that case to decide the preemption issue in the present case. The court of appeals' decision creates uncertainty in the law that is certainly unnecessary and may result in unfairness to litigants. The importance of clarity in the area is illustrated by the fact that the Supreme Court granted certiorari in Jackson Transit Authority" [b]ecause of the importance of the interpretation of § 13(c) for local transit labor relations".[59] For the same reason, we conclude it is important for this Court to reach the preemption issue presented in this case.

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[58] *Id.* at 29, 102 S.Ct. 2202 (footnote omitted).

[59] *Id.* at 20, 102 S.Ct. 2202 (footnote omitted).

III

We come at last to the issue itself, which is a narrow one. DART, for its part, concedes that it would not be immune from suit by ATU 1338 to require that the grievance procedures laid out in the Arrangement be followed. If, for example, DART refused to provide the hearing called for, or to engage in the prescribed fact-finding process, DART acknowledges that ATU 1338 could sue to enforce the Arrangement. ATU 1338, on the other hand, does not challenge the adequacy of the 1991 Arrangement under section 13(c) or argue that Texas law prohibiting collective bargaining by public employees is inapplicable to DART or is preempted by section 13(c). And while ATU 1338 argued below that DART is not immune from suit on its agreements, it has abandoned those arguments in this Court. We accept without comment all these concessions for purposes of this case. The issue before us comes down to this: does section 13(c) preempt DART's immunity from ATU 1338's suit to enforce the 2002 Resolution?

Federal law can preempt state law expressly or implicitly.[60] ATU 1338 does not contend that the UMTA contains any express preemption of state law. The United States Supreme Court has summarized implicit preemption as follows:

> [A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict

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[60] *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex.2001).

> pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[61]

ATU 1338 focuses on the latter component of implied preemption, arguing that by preventing suit to enforce the 2002 Resolution, state immunity law stands as an obstacle to achieving the full purpose of section 13(c) to protect transit employees' interests.

But section 13(c) requires only that a transportation authority make arrangements that "the Secretary of Labor concludes are fair and equitable."[62] The 1991 Arrangement was negotiated with ATU 1338 and was approved by the Secretary of Labor. As we have noted, ATU 1338 does not argue that the Arrangement is less than fair and equitable as required by section 13(c). The Arrangement, which achieves the full purposes of section 13(c), does not provide for binding or judicially enforceable general grievance resolutions. Under Attachment B, a hearing must be conducted, and if the grievance is not resolved, a fact-finding process ensues. But the end result of that process is an arbitration panel's report and recom-

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[61] *Freightliner*, 514 U.S. at 287, 115 S.Ct. 1483 (citations and internal quotation marks omitted); *see also Great Dane*, 52 S.W.3d at 743.

[62] Pub.L. No. 88-365, § 10(c), 78 Stat. 302, 307, redesignated as § 13(c) by Pub.L. No. 89-562, § 2, 80 Stat. 715, 716, as amended, now codified at 49 U.S.C. § 5333(b) (2006) ("As a condition of financial assistance under . . . this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance . . . shall specify the arrangements.").

mendations that are expressly "advisory only" and not binding on either party. The report must be published in the local media, suggesting that the parties' recourse is then through political processes. Municipalities that are part of DART may be pressured to instruct the members each appoints to DART's governing board to adopt certain policies,[63] and municipalities may withdraw from DART altogether.[64]

ATU 1338 acknowledges that a fact-finding report produced under Attachment B cannot be enforced in court but argues that the 2002 Resolution is different. ATU 1338 cannot explain, however, why it should be entitled to enforce a general grievance resolution to which DART agreed when the process would not have produced an enforceable result had it continued to the end. The Resolution expressly recognized that it did not change DART's "position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work." The Resolution also recognized that DART was not waiving "its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees." Although the Resolution recited DART's intention to comply with its terms, it also provided that if DART made any unilateral change, the consequence would only be to relieve ATU 1338 of its commitment to a moratorium on filing general grievances.

ATU 1338 argues that for DART to be immune from this suit makes the Resolution pointless. But

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[63] *See* TEX. TRANSP. CODE §§ 452.571-.580.

[64] *Id.* §§ 452.651-662.

ATU 1338's complaint is with the 1991 Arrangement, not state immunity law. The Arrangement gave ATU 1338 no judicial recourse. DART's immunity from suit takes nothing away from ATU 1338 to which it was entitled under section 13(c). ATU 1338 argues that if it cannot sue to enforce the Resolution, it is left with no recourse at all. But the Resolution itself contemplates that if DART unilaterally failed to comply with its terms, ATU 1338 could simply file another general grievance and invoke the process provided by Attachment B.

Given that an arrangement can meet the requirements of section 13(c) without providing for judicial enforcement of grievance resolutions, nothing in that statute implicitly preempts state immunity law. Accordingly, we conclude that section 13(c) does not preempt DART's immunity from this suit.

* * *

The judgment of the court of appeals is therefore reversed and the case is dismissed.

APPENDIX B

COURT OF APPEALS OF TEXAS,
DALLAS.

No. 05–05–00241–CV.

DALLAS AREA RAPID TRANSIT,
Appellant,

v.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Appellee.

Oct. 14, 2005.

Before Justices WHITTINGTON, FRANCIS, and LANG.

OPINION

Opinion by Justice WHITTINGTON.

Amalgamated Transit Union Local No. 1338 sued Dallas Area Rapid Transit for violations of a general grievance resolution. DART filed a plea to the jurisdiction, claiming governmental immunity. The trial judge denied the plea. DART appeals, arguing in a single issue that the trial court did not have jurisdiction over ATU 1338's suit. We affirm the trial court's order.

BACKGROUND

ATU 1338 is a labor organization representing employees of DART, a regional transportation au-

thority. *See* TEX. TRANSP. CODE ANN. §§ 452.001–720 (Vernon 1999 & Supp.2004–05). In 2001, ATU 1338 filed a general group grievance on behalf of its bargaining unit members. In June 2002, DART and ATU 1338 entered into a general grievance resolution agreement to resolve the dispute. The resolution addressed salaries and wages for DART employees as well as other issues. In this lawsuit, ATU 1338 alleges DART breached the resolution agreement by failing to implement the pay increase included in the resolution and taking other unilateral actions inconsistent with the resolution. DART filed a plea to the jurisdiction, claiming the trial court lacked subject matter jurisdiction over ATU 1338's claims on the grounds of governmental immunity. ATU 1338 argued in response that state governmental immunity law was preempted by federal law. The trial judge denied DART's plea.

STANDARD OF REVIEW

A plea to the jurisdiction is a dilatory plea by which a party challenges a court's authority to determine the subject matter of an action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Whether a trial court has subject matter jurisdiction is a question of law to be reviewed de novo. *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex.2002). In performing this review, we do not look to the merits of the plaintiff's case but consider only the pleadings and the evidence pertinent to the jurisdictional inquiry. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002) (*citing Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex.2001)). Although federal preemption is not usually a jurisdictional question, *see Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427

(Tex.2005) (federal preemption usually defense to plaintiff's suit but does not ordinarily deprive state court of jurisdiction), here it is asserted not to deprive the state court of jurisdiction but to maintain it despite DART's plea.

DISCUSSION

DART argues the trial court did not have jurisdiction for five reasons. First, DART argues its status as a governmental entity provides it with immunity from ATU 1338's lawsuit. Second, DART argues it has not waived its immunity. Third, DART asserts it has not taken affirmative action to invoke the trial court's jurisdiction. Fourth, DART maintains federal law does not preempt state law to confer jurisdiction on the trial court. Fifth, DART argues ATU 1338's sole redress is through an administrative grievance process. Our resolution of the fourth argument is dispositive of the appeal. *See* TEX.R.APP. P. 47.1. DART's first, second, third, and fifth arguments are premised upon governmental immunity. We conclude the federal Urban Mass Transportation Act (UMTA) preempts state governmental immunity law in this case. *See* 49 U.S.C.A. § 5333(b) (West Supp.2005) (formerly designated as section 13(c) and referred to as section 13(c) in case law).

"If a state law conflicts with federal law, it is preempted and has no effect." *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex.2001); see also U.S. CONST. art. VI, cl. 2 ("The laws of the United States are the 'supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'") (quoted in *Great Dane Trailers*, 52 S.W.3d at 743). Preemption may be express or implied. *See Great Dane Trailers*, 52 S.W.3d at 743. Federal law may impliedly preempt

state law if it is impossible for a private party to comply with both state and federal requirements or if state law obstructs accomplishing and executing Congress's full purposes and objectives. *Great Dane Trailers*, 52 S.W.3d at 743; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (because rule of state tort law upon which plaintiffs sued would have stood "as an obstacle to the accomplishment and execution of" important objectives of federal motor vehicle safety standard, it was preempted).

ATU 1338 contends application of state governmental immunity law would thwart Congress's intent and the purposes of the UMTA. The United States Supreme Court discussed the purposes of the UMTA in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 102 S.Ct. 2202, 72 L.Ed.2d 639 (1982). At a time when many private transportation companies across the country were in "precarious financial condition," the UMTA "was designed in part to provide federal aid for local governments in acquiring failing private transit companies so that communities could continue to receive the benefits of mass transportation despite the collapse of the private operations." *Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202. Congress was also aware, however, "that public ownership might threaten existing collective-bargaining rights of unionized transit workers employed by private companies." *Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202. The Court continued,

> If, for example, state law forbade collective bargaining by state and local government employees, the workers might lose their collective-bargaining rights when a private company was

> acquired by a local government. To prevent federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included § 13(c) in the Act. Section 13(c) requires, as a condition of federal assistance under the Act, that the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected by [the] assistance." The statute lists several protective steps that must be taken before a local government may receive federal aid . . . . The protective arrangements must be specified in the contract granting federal aid.

Jackson Transit Auth., 457 U.S. at 17–18, 102 S.Ct. 2202 (citations omitted).

The *Jackson Transit Authority* Court noted Congress's concern that state law may forbid collective bargaining by state and local government employees, and thus "workers might lose their collective-bargaining rights when a private company was acquired by a local government." *See Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202. In Texas, state law does prohibit collective bargaining by government employees. *See* TEX. GOV'T CODE ANN. § 617.002 (Vernon 2004) (official of state or political subdivision may not enter into collective bargaining contract with labor organization regarding wages, hours, or conditions of employment of public employees; any such contract void). DART, however, is a party to an "Arrangement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964," under which DART agreed the "existing rights of employees covered by this Arrangement to present grievances concerning their wages, hours of work, or conditions of work, individually or through a representative . . .

shall be preserved and continued." *Arrangement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964*, ¶ 4. DART makes annual certifications and assurances of its compliance with federal law and regulations to the Federal Transit Authority to obtain federal assistance, and a significant portion of DART's annual budget is derived from federal funds. Thus, the 13(c) arrangement between DART and ATU 1338 is consistent with Congress's intent "to prevent federal funds from being used to destroy the collective-bargaining rights of organized workers." *See Jackson Transit Auth.*, 457 U.S. at 17, 102 S.Ct. 2202.

While the issue in Jackson Transit Authority was whether Congress intended to create federal causes of action for breaches of section 13(c) agreements and collective bargaining contracts, *see Jackson Transit Auth.*, 457 U.S. at 21, 29, 102 S.Ct. 2202, the Court noted "it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective-bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach." *Jackson Transit Auth.*, 457 U.S. at 20–21, 102 S.Ct. 2202. The Court concluded the contracts at issue were to be governed by state, not federal, law. *See Jackson Transit Auth.*, 457 U.S. at 29, 102 S.Ct. 2202. The Court explained, "Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law." *Jackson Transit Auth.*, 457 U.S. at 28, 102 S.Ct. 2202.

We have also noted "arrangements under section 13(c) of the Urban Mass Transportation Act are not collective bargaining contracts," but are "contracts, albeit contracts required by federal statute." *Dallas*

Area Rapid Transit v. Plummer, 841 S.W.2d 870, 874 (Tex.App. Dallas 1992, *writ denied*), *abrogated in part on other grounds by Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (Texas Uniform Declaratory Judgment Act waives governmental immunity for awards of attorneys' fees). Section 13(c) protective arrangements are "valid and enforceable in state courts." *Plummer*, 841 S.W.2d at 874. "Employees covered by a section 13(c) agreement, or their union, may bring a contract action in state court to enforce the agreement." *Plummer*, 841 S.W.2d at 874 (*citing Jackson Transit Auth.*, 457 U.S. at 29 n. 13, 102 S.Ct. 2202).

DART argues ATU 1338's claim is not for breach of a section 13(c) arrangement, but only for breach of the resolution agreement. We disagree. The general grievance resolution agreement recites that ATU 1338's grievance was addressed "in conformity with Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Government Code and DART's [Section] 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991." As we noted in Plummer, "DART's personnel policy manual contains the grievance procedure properly promulgated pursuant to section 13(c) and, as part of the section 13(c) agreement, is binding on DART." *Plummer*, 841 S.W.2d at 874. We concluded in Plummer the trial court "was correct in finding that DART has a contractual duty to implement the Trial Board's award and that failing to do so constitutes a breach of that duty." Plummer, 841 S.W.2d at 874. As in Plummer, ATU 1338 "may bring a contract action in state court to enforce the agreement." *See Plummer*, 841 S.W.2d at 874.

Assuming state law provides that DART, as a governmental entity, is immune from suit, this immunity would obstruct accomplishing and executing Congress's full purposes and objectives under the UMTA. *See Great Dane Trailers*, 52 S.W.3d at 743; *Geier*, 529 U.S. at 882, 120 S.Ct. 1913. The UMTA, as interpreted in *Jackson Transit Authority*, is clear: state law is to control labor relations between local governments and unionized transit workers, as long as the workers' collective-bargaining rights are preserved before a local government receives federal aid. *See Jackson Transit Auth.*, 457 U.S. at 17, 27, 102 S.Ct. 2202. Congress designed section 13(c) of the UMTA "as a means to accommodate state law to collective bargaining." *Jackson Transit Auth.*, 457 U.S. at 27, 102 S.Ct. 2202. Although section 13(c) may be narrowly drafted to minimize its effects on state labor law, Congress's clear intent was to preserve collective-bargaining rights. Where state immunity law would preclude enforcement of the rights preserved under section 13(c), Congress's objectives could not be accomplished. Therefore, state immunity law "is preempted and has no effect." *See Great Dane Trailers*, 52 S.W.3d at 743.

Not all conflicts between federal statutes and state immunity laws result in preemption. The United States Supreme Court held the State of Maine was immune from a suit by its employees under the Federal Fair Labor Standards Act because Congress cannot abrogate a state's sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 754, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (applying sovereign immunity pursuant to Eleventh Amendment of United States Constitution). The rule in Alden, however, does not apply to DART in this case because DART is not an "arm of the state." *See Alden*, 527 U.S. at 756, 119

S.Ct. 2240 (sovereign immunity bars suits against State or "arm of the state" but not lesser governmental entity); *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 322 (5th Cir.) (DART not "arm of the state" entitled to assert federal Eleventh Amendment immunity in case under Age Discrimination in Employment Act), *cert. denied*, 534 U.S. 1042, 122 S.Ct. 618, 151 L.Ed.2d 540 (2001); *see also Hoff v. Nueces County*, 153 S.W.3d 45, 49 (Tex. 2004) (*per curiam*) (Eleventh Amendment immunity does not bar suit against "lesser entities" such as county). As noted in Alden, "certain limits are implicit in the constitutional principle of sovereign immunity;" it "does not bar all judicial review of state compliance with the Constitution and valid federal law." *Alden*, 527 U.S. at 755, 119 S.Ct. 2240. Here, state immunity law does not bar judicial review of ATU 1338's claims.

We affirm the trial court's denial of DART's plea to the jurisdiction.

APPENDIX C

[Logo]

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-05-00241-CV

DALLAS AREA RAPID TRANSIT,
Appellant,

v.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Appellee

Appeal from the 191st Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 04-06740-J).

Opinion delivered by Justice Whittington, Justices Francis and Lang participating.

JUDGMENT

In accordance with this Court's opinion of this date, we AFFIRM the trial court's order denying the plea to the jurisdiction. We ORDER that appellee Amalgamated Transit Union Local No. 1338 recover its costs of this appeal from appellant Dallas Area Rapid Transit.

Judgment entered October 14. 2005.

/s/ Mark Whittington
MARK WHITTINGTON
JUSTICE

APPENDIX D

Order issued December 5, 2005

[Logo]

In The
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-05-00241-CV

DALLAS AREA RAPID TRANSIT,
Appellant

v.

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Appellee

ORDER

Before Justices Whittington, Francis, and Lang

Appellant's October 31, 2005 Motion for Rehearing is DENIED.

/s/ Mark Whittington
MARK WHITTINGTON
JUSTICE

APPENDIX E

IN THE DISTRICT COURT
191st JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. 04-06740-J

AMALGAMATED TRANSIT UNION LOCAL NO. 1338
Plaintiff,

vs.

DALLAS AREA RAPID TRANSIT,
Defendant.

ORDER ON PLEA TO THE JURISDICTION

On the 16th day of November, 2004 came on for hearing the Plea to the Jurisdiction of Dallas Area Rapid Transit in the above styled and numbered cause. All parties appeared through their counsel of record. At the conclusion of the hearing the Court requested additional briefing, which was provided. Having considered the plea, the response, the briefing, the applicable law, the jurisdictional evidence presented and its file, this Court is of the opinion and finds that the Plea to the Jurisdiction should be denied.

IT IS THEREFORE ORDERED that Dallas Area Rapid Transit's Plea to the Jurisdiction be, and it hereby is, denied.

SIGNED this 1st day of Feb 2005.

/s/ Catharina Haynes
Judge Presiding

Approved as to Form Only:

/s/ Hal K. Gillespie
Hal K. Gillespie, Attorney for Plaintiff

/s/ Harold R. McKeever
Harold R. McKeever, Attorney for Defendant

APPENDIX F

IN THE DISTRICT COURT
191 ST JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. 04-06740

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendants.

PLAINTIFF'S ORIGINAL PETITION AND
DEMAND FOR JURY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Amalgamated Transit Union Local No. 1338 ("ATU 1338" or "Plaintiff"), and files this its Original Petition for damages and equitable relief, complaining of Defendant Dallas Area Rapid Transit ("DART" or "Defendant"), and for cause of action respectfully shows the following:

I. DISCOVERY

1. Discovery in this case shall be conducted under Level 2 of Rule 190, Texas Rules of Civil Procedure.

II. JURISDICTION AND VENUE

2. Plaintiff has fulfilled all of the jurisdictional requirements prior to bringing this suit. Jurisdiction of the Dallas County District Court is proper pursuant to Section 24.007 of the Texas Government Code.

3. Venue is proper in Dallas County, Texas, pursuant to Section 15.002 of the Texas Civil Practice & Remedies Code in that a substantial part of the events or omissions giving rise to the claims described herein occurred in Dallas County, Texas. Additionally, DART conducts and transacts business in Dallas County, Texas, and maintains an office in Dallas County, Texas.

III. PARTIES

4. Plaintiff ATU 1338 is a labor organization representing employees (*e.g.* bus drivers) of DART. ATU 1338's primary purpose and objective is to identify employment concerns and problem areas of transit workers of DART and to improve all aspects of the work environment of transit workers, including the establishment of clear, concise, and fair employment policies, practices, and procedures.

5. Defendant DART is a regional transportation authority organized and existing under Texas Transportation Code, Chapter 452, having its principle place of business in Dallas County, Texas. DART may be served with citation in this action by serving its agent for service of citation: Gary Thomas, President Executive Director of DART, 1401 Pacific Avenue, Dallas, Texas 75202.

IV. FACTUAL BACKGROUND

6. On April 24, 2001, in accordance with Section 8.10 of the DART Hourly Employment Manual ("HEM"), ATU 1338 filed a "General Group Grievance" on behalf of its bargaining unit members.

7. In order to address the grievance, and in conformity with Section 8.10 of the DART HEM, Section 617.005 of the Government Code, and DART' s 13(c)

Capital Arrangement certified by the Department of Labor on September 30, 1991, the parties (DART and ATU 1338) met and conferred to address the grievance issues.

8. As a result of the meeting regarding the grievance issues, DART and ATU 1338 entered into a General Grievance Resolution ("Resolution Agreement") which was ratified and signed by Gary Thomas, President Executive Director of DART, Roland Castaneda, General Counsel for DART, and Kenneth Kirk, then presiding President and Business Agent for ATU 1338. A true and correct copy of the Resolution Agreement is attached hereto as Exhibit A.

9. Paragraph B of the Resolution Agreement provides for increases in the "Salaries and Wages for Operating Employees." Paragraphs B(1-3) specifically provide:

> 1. Effective the first full pay period in October 2001, each hourly employee who is in an active pay status shall receive a general pay increase of four percent (4%).
>
> 2. Effective the first full pay period in October 2002, each hourly employee who is in an active pay status shall receive a general pay increase of four percent (4%).
>
> 3. Effective the first full pay period in October 2003, each hourly employee who is in an active pay status shall receive a general pay increase of four percent (4%).

(emphasis added).

10. Paragraph P of the Resolution Agreement establishes that the terms of the Resolution Agreement are final and entered into by the parties in order to

resolve the issues raised in ATU 1338's general grievance. Paragraph P specifically provides:

> This Resolution of the General Grievance filed April 24, 2001 constitutes a final resolution to the issues raised in the General Grievance. Furthermore, Amalgamated Transit Union, Local 1338 shall not file a General Grievance concerning terms and conditions of employment, specified wages, hours, and conditions of work for a period of three (3) years. Said term shall run from October 1, 2001 to September 30, 2004. DART agrees for the three (3) year period it will not make any unilateral changes to DART's hourly employment manual except for those issues remaining open herein.

(emphasis added).

11. Paragraph S of the Resolution Agreement describes the "Management Rights" of DART and further illustrates that DART agreed to abide by the terms of the Resolution Agreement in order to resolve the underlying general grievance. Paragraph S(4) specifically provides:

> DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its (13)(c) Arrangements and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees. This general grievance is therefore resolved subject to all the foregoing limitations.

(Emphasis added).

12. Despite DART's "position" that it may not enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment with public employees, ATU 1338 never agreed to this "position" of DART. Furthermore, Texas law is definitively contrary to DART's position. In *Dallas Area Rapid Transit v. Plummer*, a lawsuit involving DART and a member of ATU 1338, the Dallas Court of Appeals held *inter alia* that employees, or their union, covered by a section 13(c) Urban Mass Transportation Act agreement, may bring a contract action in state court to enforce the agreement and that such agreements are binding on DART. *Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 874 (Tex. App.-Dallas, 1992, *writ denied*).

13. The Resolution Agreement is a final resolution of a general grievance brought pursuant to Section 8.10 of the DART HEM and in conformity with DART's 13(c) Capital Arrangement certified by Department of Labor. Just as in *Plummer*, the Resolution Agreement is a binding contract upon which ATU 1338 may enforce through legal action in state court.

14. On or about September 23, 2003, the DART Board of Directors approved DART's 2003-2004 budget. In doing so, the Board did not provide for DART employees' 4% general pay increase for the year 2003 - 2004 as provided for in Paragraph B(3) of the Resolution Agreement. To date, DART has not provided the 4% general pay increase agreed to in Paragraph B(3) of the Resolution Agreement.

15. DART has unilaterally changed its policy on the amount of life insurance available to employees. Previously, in accordance with the HEM, an employee

was eligible for life insurance at two to three times the employee's annual salary level. DART has unilaterally decreased this benefit to allow employees to be eligible for life insurance at one time the employee's annual salary level. This unilateral policy change violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual . . . "

16. DART has unilaterally changed its policy on the amount of Service Incentive Pay (SIP) provided to employees. DART has frozen the level of SIP at 2002 pay rates instead of increasing SIP to 2003 level pay rates. The unilateral freezing of the SIP level violates the terms of the HEM and is a unilateral policy change that violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual . . . "

17. DART has unilaterally instituted a new accident policy for the maintenance department which DART is calling, "SOP" or "Standing Operating Procedure." The unilateral creation of this new policy violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual . . . "

18. DART has unilaterally instituted a new policy of not providing full benefits to new full time employees until after ninety days of employment, and is not allowing new full time employees to invest in a 401k plan until after six months of employment. Previously, when an employee was hired as a new full time employee, he/she would immediately receive full benefits and full 401k benefits. The unilateral change

of this policy violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual . . . "

19. On or about September 30, 2003, ATU 1338 President/Business Agent Kenneth Kirk sent a letter to DART Chairman of Board of Directors Robert Pope, and President/Executive Director Gary Thomas informing DART that ATU 1338 was asking DART to take all necessary action to implement the 4% general pay increase called for in Paragraph B(3) of the Resolution Agreement and that DART's failure to do so violated the Resolution Agreement.

20. The actions complained of herein directly affect and injure ATU 1338 and the members of the ATU 1338. The claims asserted herein are germane to ATU 1338's purpose and objective. Moreover, ATU 1338 is directly affected by the complained of acts through a reduction in its membership's salaries and wages, and a weakening of ATU 1338's negotiating strength on behalf of its members.

21. Plaintiff has retained the undersigned attorneys in order to prosecute this action.

22. Plaintiff hereby demands a trial by jury on all claims and defenses in this action.

V. FIRST CAUSE OF ACTION - *Breach of contract*

23. Plaintiff realleges and incorporates the allegations contained in Paragraphs 1 through 22 as if fully contained herein.

24. Defendant breached the Resolution Agreement contract with Plaintiff when Defendant ceased to perform under the contract as stated supra when Defendant: (1) failed to implement the 4% general pay in-

crease agreed to in Paragraph B(3) of the contract, (2) unilaterally changed the life insurance policy, (3) unilaterally changed its SIP policy, (4) unilaterally instituted a new maintenance accident policy, and (5) unilaterally changed the policy for payment of benefits to new full time employees.

25. The Resolution Agreement contract between Defendant and Plaintiff was supported by adequate consideration. The parties mutually agreed to all relevant terms. All conditions precedent to Defendant's performance under the contract have been performed or have occurred. Performance by Defendant was not excused and DART agreed that for a three year period (running from October 1, 2001 to September 30, 2004), DART would abide by the terms of the resolution and not make any unilateral changes to DART's HEM.

26. Plaintiff has performed its obligations under the contract. In particular, prior to Defendant's breach of the contract, Plaintiff withheld from filing any general grievance concerning terms and conditions of employment, specified wages, hours, or conditions of work.

27. As a result of Defendant's breach of the contract, as set out in the preceding paragraphs of this petition, Plaintiff's members have sustained financial injury and lost the benefits expected under the contract. Furthermore, Defendant's complained of acts have harmed Plaintiff by not increasing its members' salaries and wages, and by weakening ATU 1338's negotiating strength on behalf of its members.

28. On September 30, 2003, Plaintiff notified Defendant that DART's actions were in violation of the Resolution Agreement. Defendant has refused to

honor the Resolution Agreement by: (1) failing to implement the 4% general pay increase agreed to in Paragraph B(3) of the contract, (2) unilaterally changing the life insurance policy, (3) unilaterally changing the SIP policy, (4) unilaterally instituting a new maintenance accident policy, and (5) unilaterally changing the policy for payment of benefits to new full time employees

29. Furthermore, ATU 1338 is entitled to recover its reasonable and necessary attorneys' fees because this is a claim on an oral or written contract within the meaning of Civil Practice and Remedies Code §38.001.

30. ATU 1338 hereby demands trial by jury on all claims and defenses in this action.

VI. PRAYER

WHEREFORE, Plaintiff ATU 1338 requests that Defendant Dallas Area Rapid Transit (DART) be cited to appear and answer, and that after trial by jury, ATU 1338 have judgment against DART as follows:

1. Actual damages;
2. Pre-judgment interest in the maximum amount allowed by law;
3. Reasonable and necessary attorneys' fees;
4. Post-judgment interest in the maximum amount allowed by law;
5. Costs of suit;
6. An injunction ordering DART to retroactively implement the 4% general pay increase agreed to in Paragraph B(3) of the Resolution Agreement with retroactive application of the injunction to the first full pay period in October 2003;

7. An injunction ordering DART to restore the level of life insurance benefits previously offered to DART employees by providing DART employees life insurance benefits at two to three times their annual salary level;

8. An injunction ordering DART to retroactively restore and pay SIP at increased levels in accordance with the HEM;

9. An injunction ordering DART to invalidate and nullify the new Standard Operating Procedure policy which DART has unilaterally implemented for the maintenance department;

10. An injunction ordering DART to provide full benefits to all newly hired employees in accordance with the HEM and to retroactively provide full benefits upon any employee denied benefits during their first 90 days of employment with DART; and

11. Such other and further relief to which Plaintiff may justly be entitled.

Respectfully submitted,

GILLESPIE, ROZEN,
WATSKY, & MOTLEY, P.C.
3402 Oak Grove Avenue,
Suite 200
Dallas, Texas 75204
Telephone.: (214) 720-2009
Telecopier: (214) 720-2291

Date: 7/14/04

By: /s/ Hal K. Gillespie
Hal K. Gillespie (attorney-in-charge)
State Bar No. 07925500
Joseph H. Gillespie
State Bar No. 24036636

IN THE DISTRICT COURT
___ JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. _____

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendants.

PLAINTIFF'S JURY DEMAND

COMES NOW Amalgamated Transit Union Local No. 1338, Plaintiff in the above-styled cause, and hereby demands a jury trial on all issues, claims, defenses, and actions in the above-styled cause.

Respectfully submitted,

GILLESPIE, ROZEN,
WATSKY, & MOTLEY, P.C.
3402 Oak Grove Avenue,
Suite 200
Dallas, Texas 75204
Telephone.: (214) 720-2009
Telecopier: (214) 720-2291

Date: 7/19/04

By: /s/ Hal K. Gillespie
Hal K. Gillespie (attorney-in-charge)
State Bar No. 07925500
Joseph H. Gillespie
State Bar No. 24036636

APPENDIX G

GENERAL GRIEVANCE RESOLUTION

WHEREAS, Amalgamated Transit Union, Local Division 1338 ("ATU") filed a "General Group Grievance" on April 24, 2001 in accordance with Section 8.10 of the Dallas Area Rapid Transit ("DART") Hourly Employment Manual ("HEM"); and

WHEREAS, in conformity with Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Government Code and DART's 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991, the parties did meet and confer to address the grievance issues stated in the General Grievance; and

WHEREAS, it is the intent of DART to resolve the issues raised in the General Grievance;

NOW THEREFORE, these issues are resolved as follows:

A: DART HOURLY EMPLOYMENT MANUAL

Attached as Exhibit 1 are the agreed proposed revisions that will be subject to the Hourly Employment Manual (HEM) 8.12 modification process.

B: SALARIES AND WAGES FOR OPERATING EMPLOYEES

1. Effective the first full pay period in October 2001, each hourly employee who is in an active pay status shall receive a general pay increase of four percent (4%).

2. Effective the first full pay period in October 2002, each hourly employee who is in an active pay status shall receive a general pay increase of four percent (4%).

3. Effective the first full pay period in October 2003, each hourly employee who is in an active pay status shall receive a general pay increase of four percent (4%).

C: QUARTERLY INCENTIVE BONUS PROGRAM

DART will continue the quarterly incentive bonus program governed by the same provisions presently in effect through FY 2004. Military Leave Without Pay will not be characterized as an unscheduled absence. This program continues uninterrupted and retroactive to October 1, 2001.

D: SERVICE AWARD CALCULATION

Part-time service at DART will be included in the calculation of time for the purpose of service awards.

E: RAIL YARD OPERATOR SHIFT DIFFERENTIAL PAY

Operators who are regularly scheduled work assigned to the rail yard will be compensated twenty-five cents ($0.25) over their base pay rate for all hours worked while assigned to the rail yard.

F: RAIL YARD OPERATOR AND RAIL EXTRA BOARD ALLOWANCE

Regular full-time employees who work regularly scheduled work assigned to the rail yard or rail extra board will be provided shoe/foul weather gear.

G: MATERIAL CONTROL EMPLOYEE ALLOWANCE

Regular full-time employees who work regularly scheduled work assigned to Materials Control will be given $200.00 as the annual shoe/foul weather gear allowance, effective October I, 2001 through the conclusion of this agreement.

H: MAINTENANCE EMPLOYEE TOOL ALLOWANCE

Regular full-time skilled employees who work regularly scheduled work assigned to the Maintenance Department will be given $325.00 as the annual tool allowance, effective October 1, 2001 through the conclusion of this agreement.

I: MAINTENANCE EMPLOYEE SHOE ALLOWANCE

All full-time Maintenance Department employees who are employed on October 1st of each calendar will be given $115.00 as the annual shoe allowance, effective October 1, 2001 through the conclusion of this agreement.

J: MAINTENANCE EMPLOYEE-SICK LEAVE PAY

All absence hours up to 80 hours in a rolling twelve-month period will no longer be subject to sick leave ineligibility for failure to provide medical verification. In order to maintain eligibility for sick leave pay for absence hours beyond the 80 hours, employees must present to their supervisor a medical verification, consistent with Maintenance Department Attendance Control Procedure (HEM, Section MD-I5) prior to the completion of their shift upon the first day of their return to work. Employees not complying with this requirement will forfeit sick leave pay for those unscheduled hours in excess of the accumulated 80 hours. Absences while participating in the Alternative Duty Program are not automatically exempt from being classified as "unscheduled" and shall be considered as any other absence.

K: EYEGLASS ALLOWANCE

Regular full-time employees will be given an available open enrollment option through Aetna U.S.

Healthcare of a three hundred dollar ($300.00) biennial eyewear/contact/lenses allowance. See the health benefits materials for more infatuation.

L: TRANSPORTATION ADMINISTRATION OF DISCIPLINE

DART shall remove from each hourly employee all preventable accidents prior to October 1, 1999. Subject to the foregoing, operators with 2 or 3 preventable accidents currently on record will be held in abeyance for 120 calendar days (beginning November 28, 2001); if no additional preventable accidents occur during the time of abeyance, the oldest preventable accident will be dropped from record (applicable to operators who had 2 or 3 preventable accidents on their record as of 11/28/01). ATU agrees that operators with three (3) preventable accidents in a 30-month period may be discharged. Preventable accidents do not include passenger accidents.

M: H.O.V. PROCEDURES

Attached as Exhibit 2 are the agreed H.O.V. Procedures, to be used departmentally for H.O.V. employees only.

N: MODIFIED LIGHT RAIL TRANSFER ARRANGEMENT

Attached as Exhibit 3 are the agreed changes to IV. 2. of the current arrangement. DART agrees to submit the modification to Department of Labor (DOL) to be considered with the next applicable grant. ATU will agree to and not oppose the modifications.

O: OTHER POLICY MATTERS AND CLARIFICATIONS

It is understood that there are remaining policy matters arising from the "General Grievance," dated

April 24, 2001. Therefore, DART and ATU agree that those remaining matters shall be acted on within the first quarter of calendar year 2002. The remaining matters are as follows:

a. Establish process team to review transportation travel time options;

b. Establish timeline to complete review and implement changes to HEM Chapter 10, Substance Abuse Policy.

It is understood between DART and ATU that certain acknowledgements arise from the "General Grievance," dated April 24, 2001. Therefore, the following are those acknowledgements:

a. Customer Service acknowledges it has improved training and increased internal promotion opportunities and agrees to continue to do so;

b. ATU acknowledges and agrees it will waive the need for divisional mark-up, only when planned service changes necessitate multiple general mark-ups in a 12-month period.

P: TERM OF RESOLUTION

This Resolution of the General Grievance filed April 24, 2001, constitutes a final resolution to the issues raised in the General Grievance. Furthermore, Amalgamated Transit Union, Local 1338, shall not file a General Grievance concerning terms and conditions of employment, specified wages, hours or conditions of work for a period of three (3) years. Said term shall run from October 1, 2001 to September 30, 2004. DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual except for those issues remaining open herein.

Q: CONFLICT OF LAWS

The legal invalidity or unenforceability of provisions of this resolution shall not affect the remaining provisions thereof.

R: RATIFICATION AND APPROVAL

The Union has obtained ratification by their membership in conformity with their constitution.

S: MANAGEMENT RIGHTS

1. DART, at its sole discretion, possesses the right in accordance with applicable laws, to manage all operations, including the direction of the working force and the right to plan, direct and control the operation of all equipment and other property of DART, except as modified by Section 8.10 of the DART Hourly Employment Manual and Section 617.005 of the Texas Government Code and DART's 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991 pursuant to USC § 5333(b), if applicable. Notwithstanding subpart N. of this agreement, nothing herein changes DART' s position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work. In the event that DART makes any unilateral change except for issues remaining open herein during the term of this Resolution, such change relieves Local 1338 of its commitment not to file a General Grievance from October 1, 2001 to September 30, 2004.

2. Matters of inherent managerial policy are reserved exclusively to DART under law. These include but shall not be limited to such areas of discretion or policy as the functions and programs of DART, standards of service, its overall budget, utilization of

technology, the organizational structure and selection and direction of personnel.

3. The listing of specific rights in this article is not intended to be nor should be considered, restrictive or a waiver of any rights of management not listed and not specifically surrendered herein whether or not such rights have been exercised by DART in the past.

4. DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its 13(c) Arrangement and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees, This general grievance is therefore resolved subject to all the foregoing limitations.

IN WITNESS WHEREOF, DART and ATU acknowledge the General Grievance Resolution and the changes to be made to the DART Hourly Employment Manual.

AMALGAMATED TRANSIT UNION

/s/ Kenneth Kirk
Kenneth Kirk
President, Local ATU 1338

Date: June 5, 2002

DALLAS AREA RAPID TRANSIT

/s/ Gary Thomas
Gary Thomas
President/Executive Director

Date: June 11, 2002

APPROVED AS TO FORM:

/s/ Roland Castañeda
Roland Castañeda
DART General Counsel

APPENDIX H

IN THE DISTRICT COURT
191st JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

[Filed Sept. 17, 2004]

Cause No. 04-06740-J

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

vs.

DALLAS AREA RAPID TRANSIT,
Defendant.

DEFENDANT'S ORIGINAL ANSWER

Defendant Dallas Area Rapid Transit ("DART") files this its Original Answer to Plaintiffs Original Petition (the "Petition") as follows:

I.

GENERAL DENIAL

Pursuant to Texas Rule of Civil Procedure 92, DART denies each and every allegation contained in the Petition, as the same may be amended, and demands strict proof thereof by a preponderance of the credible evidence.

II.

AFFIRMATIVE DEFENSES

Pursuant to Texas Rule of Civil Procedure 94, DART makes the following affirmative defenses:

1. At the time and on the occasion of the incident made the basis of this lawsuit, DART

was lawfully engaged in the performance of a governmental function in that it was operating a regional public transit system named Dallas Area Rapid Transit. DART would show that by legislative declaration, Article 1118y, Texas Revised Civil Statutes, codified in Texas Transportation Code, Chapter 452, the activities of Dallas Area Rapid Transit constitute a public and essential governmental function. By reason thereof, DART invokes the defense of governmental immunity.

WHEREFORE, PREMISES CONSIDERED, DART prays that the Plaintiff take nothing by this action, and that DART recover all costs together with any such other and further relief, general or special, at law or in equity, to which DART may be entitled.

Respectfully submitted,

By: /s/ Harold R. McKeever
HAROLD R. MCKEEVER
Senior Assistant General Counsel IV
State Bar No. 13700520

Swanson Angle
General Counsel
State Bar No. 24009132

DALLAS AREA RAPID TRANSIT
P.O. Box 660163
Dallas, Texas 75266-7255
Telephone (214) 749-3043
Facsimile (214) 749-3660

ATTORNEYS FOR DEFENDANT

APPENDIX I

IN THE DISTRICT COURT
191st JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

[Filed OCT. 21, 2004]

CAUSE NO. 04-06740-J

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendants.

PLAINTIFF'S AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Amalgamated Transit Union Local No. 1338 ("ATU 1338" or "Plaintiff"), and files this its Amended Original Petition for damages and equitable relief, complaining of Defendant Dallas Area Rapid Transit ("DART" or "Defendant"), and for cause of action respectfully shows the following:

I. DISCOVERY

1. Discovery in this case shall be conducted under Level 2 of Rule 190, Texas Rules of Civil Procedure.

II. JURISDICTION AND VENUE

2. Plaintiff has fulfilled all of the jurisdictional requirements prior to bringing this suit. Jurisdiction of the Dallas County District Court is proper pursuant to Section 24.007 of the Texas Government Code.

3. Venue is proper in Dallas County, Texas, pursuant to Section 15.002 of the Texas Civil Practice & Remedies Code in that a substantial part of the events or omissions giving rise to the claims described herein occurred in Dallas County, Texas. Additionally, DART conducts and transacts business in Dallas County, Texas, and maintains an office in Dallas County, Texas.

III. PARTIES

4. Plaintiff ATU 1338 is a labor organization representing employees (e.g. bus drivers) of DART. ATU 1338's primary purpose and objective is to identify employment concerns and problem areas of transit workers of DART and to improve all aspects of the work environment of transit workers, including the establishment of clear, concise, and fair employment policies, practices, and procedures.

5. Defendant DART is a regional transportation authority organized and existing under Texas Transportation Code, Chapter 452, having its principle place of business in Dallas County, Texas. DART may be served with citation in this action by serving its agent for service of citation: Gary Thomas, President Executive Director of DART, 1401 Pacific Avenue, Dallas, Texas 75202.

IV. FACTUAL BACKGROUND

6. On April 24, 2001, in accordance with Section 8.10 of the DART Hourly Employment Manual ("HEM"), ATU 1338 filed a "General Group Grievance" on behalf of its bargaining unit members.

7. In order to address the grievance, and in conformity with Section 8.10 of the DART HEM, Section 617.005 of the Government Code, and DART's 13(c)

Capital Arrangement certified by the Department of Labor on September 30, 1991, the parties (DART and ATU 1338) met and conferred to address the grievance issues.

8. As a result of the meeting regarding the grievance issues, DART and ATU 1338 entered into a General Grievance Resolution ("Resolution Agreement") which was ratified and signed by Gary Thomas, President Executive Director of DART, Roland Castaneda, General Counsel for DART, and Kenneth Kirk, then presiding President and Business Agent for ATU 1338. A true and correct copy of the Resolution Agreement is attached hereto as Exhibit A.

9. Paragraph B of the Resolution Agreement provides for increases in the "Salaries and Wages for Operating Employees." Paragraphs B(1-3) specifically provide:

1. Effective the first full pay period in October 2001, each hourly employee who is in an active pay status **shall** receive a general pay increase of four percent (4%).

2. Effective the first full pay period in October 2002, each hourly employee who is in an active pay status **shall** receive a general pay increase of four percent (4%).

3. Effective the first full pay period in October 2003, each hourly employee who is in an active pay status **shall** receive a general pay increase of four percent (4%).

(emphasis added).

10. Paragraph P of the Resolution Agreement establishes that the terms of the Resolution Agreement are final and entered into by the parties in order to resolve the issues raised in ATU 1338's general grievance. Paragraph P specifically provides:

> This Resolution of the General Grievance filed April 24, 2001 constitutes a final resolution to the issues raised in the General Grievance. Furthermore, Amalgamated Transit Union, Local 1338 shall not file a General Grievance concerning terms and conditions of employment, specified wages, hours, and conditions of work for a period of three (3) years. Said term shall run from October 1, 2001 to September 30, 2004. DART agrees for the three (3) year period it will not make any unilateral changes to DART' s hourly employment manual except for those issues remaining open herein.

(emphasis added).

11. Paragraph S of the Resolution Agreement describes the "Management Rights" of DART and further illustrates that DART agreed to abide by the terms of the Resolution Agreement in order to resolve the underlying general grievance. Paragraph S(4) specifically provides:

> DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its (13)(c) Arrangements and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of

public employees. This general grievance is therefore resolved subject to all the foregoing limitations.

(Emphasis added).

12. Despite DART's "position" that it may not enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment with public employees, ATU 1338 never agreed to this "position" of DART. Furthermore, Texas law is definitively contrary to DART's position. In *Dallas Area Rapid Transit v. Plummer*, a lawsuit involving DART and a member of ATU 1338, the Dallas Court of Appeals held *inter alia* that employees, or their union, covered by a section 13(c) Urban Mass Transportation Act agreement, may bring a contract action in state court to enforce the agreement and that such agreements are binding on DART. *Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 874 (Tex. App. — Dallas, 1992, writ denied).

13. The Resolution Agreement is a final resolution of a general grievance brought pursuant to Section 8.10 of the DART HEM and in conformity with DART's 13(c) Capital Arrangement certified by Department of Labor. Just as in *Plummer*, the Resolution Agreement is a binding contract upon which ATU 1338 may enforce through legal action in state court.

14. On or about September 23, 2003, the DART Board of Directors approved DART's 2003-2004 budget. In doing so, the Board did not provide for DART employees' 4% general pay increase for the year 2003 -2004 as provided for in Paragraph B(3) of the Resolution Agreement. To date, DART has not

provided the 4% general pay increase agreed to in Paragraph B(3) of the Resolution Agreement.

15. DART has unilaterally changed its policy on the amount of life insurance available to employees. Previously, in accordance with the HEM, an employee was eligible for life insurance at two to three times the employee's annual salary level. DART has unilaterally decreased this benefit to allow employees to be eligible for life insurance at one time the employee's annual salary level. This unilateral policy change violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual. . ."

16. DART has unilaterally changed its policy on the amount of Service Incentive Pay (SIP) provided to employees. DART has frozen the level of SIP at 2002 pay rates instead of increasing SIP to 2003 level pay rates. The unilateral freezing of the SIP level violates the terms of the HEM and is a unilateral policy change that violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual. . ."

17. DART has unilaterally instituted a new policy of not providing full benefits to new full time employees until after ninety days of employment, and is not allowing new full time employees to invest in a 401k plan until after six months of employment. Previously, when an employee was hired as a new full time employee, he/she would immediately receive full benefits and full 401k benefits. The unilateral change of this policy violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make

any unilateral changes to DART's Hourly Employment Manual. . ."

18. On or about September 30, 2003, ATU 1338 President/Business Agent Kenneth Kirk sent a letter to DART Chairman of Board of Directors Robert Pope, and President/Executive Director Gary Thomas informing DART that ATU 1338 was asking DART to take all necessary action to implement the 4% general pay increase called for in Paragraph B(3) of the Resolution Agreement and that DART's failure to do so violated the Resolution Agreement.

19. The actions complained of herein directly affect and injure ATU 1338 and the members of the ATU 1338. The claims asserted herein are germane to ATU 1338's purpose and objective. Moreover, ATU 1338 is directly affected by the complained of acts through a reduction in its membership's salaries and wages, and a weakening of ATU 1338's negotiating strength on behalf of its members.

20. Plaintiff has retained the undersigned attorneys in order to prosecute this action.

21. Plaintiff hereby demands a trial by jury on all claims and defenses in this action.

V. FIRST CAUSE OF ACTION—*Breach of Contract*

22. Plaintiff realleges and incorporates the allegations contained in Paragraphs 1 through 21 as if fully contained herein.

23. Defendant breached the Resolution Agreement contract with Plaintiff when Defendant ceased to perform under the contract as stated *supra* when Defendant: (1) failed to implement the 4% general pay increase agreed to in Paragraph B(3) of the contract, (2) unilaterally changed the life insurance

policy, (3) unilaterally changed its SIP policy, and (4) unilaterally changed the policy for payment of benefits to new full time employees.

24. The Resolution Agreement contract between Defendant and Plaintiff was supported by adequate consideration. The parties' mutually agreed to all relevant terms. All conditions precedent to Defendant's performance under the contract have been performed or have occurred. Performance by Defendant was not excused and DART agreed that for a three year period (running from October 1, 2001 to September 30, 2004), DART would abide by the terms of the resolution and not make any unilateral changes to DART's HEM.

25. Plaintiff has performed its obligations under the contract. In particular, prior to Defendant's breach of the contract, Plaintiff withheld from filing any general grievance concerning terms and conditions of employment, specified wages, hours, or conditions of work.

26. As a result of Defendant's breach of the contract, as set out in the preceding paragraphs of this petition, Plaintiff's members have sustained financial injury and lost the benefits expected under the contract. Furthermore, Defendant's complained of acts have harmed Plaintiff by not increasing its members' salaries and wages, and by weakening ATU 1338's negotiating strength on behalf of its members.

27. On September 30, 2003, Plaintiff notified Defendant that DART's actions were in violation of the Resolution Agreement. Defendant has refused to honor the Resolution Agreement by: (1) failing to implement the 4% general pay increase agreed to in Paragraph B(3) of the contract, (2) unilaterally

changing the life insurance policy, (3) unilaterally changing the SIP policy, and (4) unilaterally changing the policy for payment of benefits to new full time employees.

28. Furthermore, ATU 1338 is entitled to recover its reasonable and necessary attorneys' fees because this is a claim on an oral or written contract within the meaning of Civil Practice and Remedies Code §38.001.

29. ATU 1338 hereby demands trial by jury on all claims and defenses in this action.

VI. PRAYER

WHEREFORE, Plaintiff ATU 1338 requests that Defendant Dallas Area Rapid Transit (DART) be cited to appear and answer, and that after trial by jury, ATU 1338 have judgment against DART as follows:

1. Actual damages;
2. Pre-judgment interest in the maximum amount allowed by law;
3. Reasonable and necessary attorneys' fees;
4. Post-judgment interest in the maximum amount allowed by law;
5. Costs of suit;
6. An injunction ordering DART to retroactively implement the 4% general pay increase agreed to in Paragraph B(3) of the Resolution Agreement with retroactive application of the injunction to the first full pay period in October 2003;
7. An injunction ordering DART to restore the level of life insurance benefits previously

offered to DART employees by providing DART employees life insurance benefits at two to three times their annual salary level;

8. An injunction ordering DART to retroactively restore and pay SIP at increased levels in accordance with the HEM;

9. An injunction ordering DART to provide full benefits to all newly hired employees in accordance with the HEM and to retroactively provide full benefits upon any employee denied benefits during their first 90 days of employment with DART; and

10. Such other and further relief to which Plaintiff may justly be entitled.

Respectfully submitted,

GILLESPIE, ROZEN, WATSKY, & MOTLEY, P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
Telephone.: (214) 720-2009
Telecopier: (214) 720-2291

Date: October 20, 2004

By: /s/ Hal K. Gillespie
HAL K. GILLESPIE (attorney-in-charge)
State Bar No. 07925500
JOSEPH H. GILLESPIE
State Bar No. 24036636

APPENDIX J

IN THE DISTRICT COURT
191st JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

[Filed OCT. 22, 2004]

CAUSE NO. 04-06740-J

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

vs.

DALLAS AREA RAPID TRANSIT,
Defendant.

DEFENDANT'S PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Dallas Area Rapid Transit ("DART"), Defendant, in the above-styled and numbered cause of action and files its Plea to the Jurisdiction of the Court and in support would show the follow:

I.

FACTUAL BACKGROUND

This lawsuit arises out of a resolution to a 2001 General Grievance filed by Plaintiff with DART, a Texas governmental entity and regional transportation authority under Chapter 452 of the Texas Transportation Code.

II.

BRIEF STATEMENT ON AND APPLICATION OF THE STANDARD OF REVIEW.

The trial court is not limited solely to the pleadings when considering a plea to the jurisdiction:

> [A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. The court should, of course, confine itself to the evidence relevant to the jurisdictional issue.

Bland Independent School District v. Blue, 34 S.W. 3d 547, 555 (Tex. 2000).

III.

DART IS A TEXAS GOVERNMENTAL ENTITY

By legislative declaration, Texas Transportation Code, Chapter 452 (formerly Article 1118y, Texas Revised Civil Statutes), the activities of the Dallas Area Rapid Transit constitute a public and essential governmental function. Chapter 452 of the Texas Transportation Code, states in pertinent part:

Sec. 452.052. NATURE OF AUTHORITY

(a) An authority:

(1) is a public political entity and corporate body;

(2) has perpetual succession; and

(3) exercises public and essential governmental functions.

(b) The exercise of a power granted by this chapter, including a power relating to a station or terminal complex, is for a public purpose and is a matter of public necessity.

(c) An authority is a governmental unit under Chapter 101, Civil Practice and Remedies Code, and the operations of the authority are not proprietary functions for any purpose including the application of Chapter 101, Civil Practice and Remedies Code.

Furthermore, Defendant DART's status as a Texas governmental entity has been judicially recognized See, *Davis v. Mathis*, 846 S.W.2d 84 (Tex. App. — Dallas 1992, no writ), *Dallas Area Rapid Transit v. Stephens*, 50 S.W.3d 621, 632-634 (Tex. App. — Dallas 2001, pet. Denied); *See also Dallas.Area Rapid Transit v. Whitley*, 104 S.W.3d 540 (Tex. 2003). (See also Plaintiff's Original Petition, paragraph 5). Plaintiffs Original Petition does not allege grounds that confer subject matter jurisdiction against a Texas governmental entity, and therefore should be dismissed with prejudice.

IV.

GOVERNMENTAL IMMUNITY

A governmental entity that can only perform governmental functions is entitled to governmental immunity. *Port of Houston Authority v. Guillory*, 814 S.W.2d 119, 122 (Tex. App. — Houston [1st Dist.] 1991) affirmed 845 S.W.2d 812 (Tex. 1993). By statute, Texas Transportation Code § 452.052, DART can only perform governmental functions and therefore is entitled to the governmental immunity. A person who sues a governmental entity must establish the government's consent to that lawsuit. See *Texas Department of Transportation v. Jones*, 8 S.W.3d 636, 638-639 (Tex. 1999). "Since as early as 1847, the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction." *Id.* Therefore, in the absence of a

specific statutory waiver of immunity, a Texas court does not have subject matter jurisdiction over any cause of action against a governmental unit. In the case before the court, Plaintiff has not alleged a specific statutory waiver of immunity and therefore should be dismissed with prejudice.

V.

PLAINTIFF'S SOLE REDRESS IS THOUGH AN ADMINISTRATIVE GRIEVANCE PROCESS

The Texas Government Code provides:

> *Collective Bargaining by Public Employees Prohibited*
>
> (a) An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment or public employees.
>
> (b) A contract entered into in violation of Subsection (a) is void.
>
> (c) An official of the state or of a political subdivision of the state may not recognize a labor organization as the bargaining agent for a group of public employees.

Tex. Gov't Code Ann. §617.002 (Vernon 1994). The Texas Government Code further provides:

> *Effect of Chapter*
>
> This chapter does not impair the right of public employees to present grievances concerning their wages, hours of employment, or conditions of work whether individually or through a representative that does not claim the right to strike.

Tex. Gov't Code Ann. 017.005 (Vernon 1994).

In accordance with Chapter 617 of the Texas Government Code and applicable federal law,[1] DART's Hourly Employment Manual includes, under Section 8.10, an administrative process by which employees may individually or through their representatives, present General Grievances, defined under Section 8.8(a)(1), as grievances regarding establishment of, or failure to establish, specified wages, hours or conditions of work as provided under Section 617.005 of the Texas Government Code. (See Exhibits 1 and 2).[2]

The document which is the subject of this lawsuit is a General Grievance Resolution of an April 24, 2001 General Grievance filed by Plaintiff under Section 8.10 of DART's Hourly Employment Manual and Section 617.005 of the Texas Government Code. (See page 1 of the General Grievance Resolution, Exhibit 3). By law, the General Grievance Resolution is unilateral and therefore not a contract. To hold it to be a bilateral contract would cause the General Grievance Resolution to be an illegal collective bargaining agreement and therefore void under Section 617.002 of the Texas Government Code. See, *Moreau v. Sheriff's Union, Local 154*, 956 F.2d 516, 520 (5th Cir. 1992); *Beverly v. City of Dallas*, 292 S.W.2d 172, 176 (Tex. Civ. App. — El Paso 1956, writ refused n.r.e.) (Section 617.005 permits the presentation of grievances, a unilateral proceeding resulting in no loss of sovereignty by the governmental agency); Op. Tex. Att'y Gen. No. 97-038, p. 3 (1997) (Exhibit 4) (Texas law does not prohibit grievance

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[1] Urban Mass Transportation Act, 49 U.S.0 §5333, which includes a "13(c) Employee Protective Arrangement."

[2] Each of the exhibits cited herein are attached and incorporated by reference as if fully set forth at length.

discussions, but the governing authority "must retain the right unilaterally to establish employment conditions."); Op. Tex Att'y Gen. No. JM-156 (1984) (Exhibit 5). Plaintiff's redress for issues included in this lawsuit is through the administrative grievance process allowed by statute and contained in DART's Hourly Employment Manual. As such, this court lacks jurisdiction to hear the complaints made by Plaintiff herein. See generally, *General Services Commission v. Little—Tex Insulation Company, Inc.*, 39 S.W.3d 591, 597 (Tex. 2001).

VI.

GENERAL GRIEVANCE RESOLUTION STATES REDRESS

Moreover, The General Grievance Resolution demonstrates that it is a unilateral resolution for which Plaintiff's redress is to proceed through the administrative grievance process, and not a contract. The General Grievance Resolution states in part:

> . . . nothing herein changes DART's position that it has a unilateral right to establish employment conditions, set wages, hours of employment or conditions of work. In the event that DART makes any unilateral change except for issues remaining open herein during the term of this Resolution, such change relieves Local 1338 of its commitment not to file a General Grievance from October 1, 2001 to September 30, 2004." (General Grievance Resolution Section S (1), p. 6, Exhibit 3)
>
> Matters of inherent managerial policy are reserved exclusively to DART under law. These include but shall not be limited to such areas of discretion or policy as the functions and

> programs of DART, standards of service, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. (General Grievance Resolution Section S (2), p. 6, Exhibit 3))
>
> DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligation, including those set forth in its 13(c) Arrangement and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment of public employees. This general grievance is therefore resolved subject to all the foregoing limitations. (General Grievance Resolution Section S (4), p. 6-7, Exhibit 3).

The General Grievance Resolution makes clear that it is subject to DART's inherent managerial responsibility, including its budget. The four items of which Plaintiff complains in this case, the failure to give hourly employees a general increase of 4% as of October 2004, freezing Service Incentive Pay at 2002 levels, requiring a waiting period for new hires to obtain certain benefits and reducing the amount of life insurance provided by DART relate in whole or in part to budgetary issues caused by a down-turn in sales tax revenue and are part of DART's inherent managerial responsibility. (Exhibit 6 and 7). Further, the General Grievance Resolution allows Plaintiff to file a grievance if DART makes unilateral changes in contravention of the resolution before the expiration of the term of the resolution and proceed under the administrative general grievance process

allowed under 8.10 of DART's Hourly Employment Manual. In fact, on or about May 7, 2004, Plaintiff filed a General Grievance, which includes items for wages, insurance benefits and Service Incentive Pay, the same topics included in this lawsuit. (Exhibit 7).

Plaintiff may not file a breach of contract claim because the General Grievance Resolution is not a contract, and if it is so construed, it is illegal under Section 617.002 of the Texas Government Code and therefore void as a matter of law. Plaintiff's redress for issues included in this lawsuit, as provided in the General Grievance Resolution, is through the administrative grievance process allowed by statute and contained in DART's Hourly Employment Manual. As such, the court lacks jurisdiction to hear the complaints made by Plaintiff herein. *Id.*

WHEREFORE, DART prays that this plea be set for hearing and upon notice and hearing, it be granted and that it have judgment of the Court that Plaintiff's lawsuit against DART be dismissed with prejudice for lack of jurisdiction, that Defendant go hence with its costs, without day, and for such other and further relief, general or special, at law or in equity, as to which Defendant may be entitled.

Respectfully submitted,

By: Harold R. McKeever
HAROLD R. MCKEEVER
Senior Assistant General Counsel IV
State Bar No. 13700520

LEGAL DEPARTMENT
DALLAS AREA RAPID TRANSIT
1401 Pacific Avenue. 1st Floor
Mailing Address: P. O. Box 660163
Dallas, Texas 75266-7255
(214) 749- 3043
Fax (214) 749-3660

ATTORNEYS FOR DEFENDANT

FIAT

A hearing on the foregoing motion has been set for the 16th day of November, 2004, at 8:30 o'clock A.M. in the 191st Judicial District Court, 600 Commerce Street, 3rd Floor, Dallas, Texas 75202.

Judge Presiding

APPENDIX K

STATE OF TEXAS
COUNTY OF DALLAS

CERTIFICATION OF
PUBLIC RECORD

By attachment of its seal below, Dallas Area Rapid Transit hereby certifies that the documents attached hereto (current 13(c) employee protective arrangement) is a public record of Dallas Area Rapid Transit and is maintained pursuant to its governmental functions, powers and responsibilities as a regional transportation authority under Texas Transportation Code chapter 452. These said pages of records are kept by Dallas Area Rapid Transit, in the regular course of its governmental duties, and it was the regular course of said governmental duties of Dallas Area Rapid Transit for an employee or representative of Dallas Area Rapid Transit with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

/s/ Lynda Jackson
LYNDA JACKSON
VICE-PRESIDENT
HUMAN RESOURCES

U.S. Department of Labor

Deputy Under Secretary for
Labor Management Relations
and Cooperative Programs
Washington, D.C. 20210

SEP 30 1991

Mr. Wilbur E. Hare
Urban Mass Transportation Administration
Region VI
819 Taylor Street
Suite 9A32
Fort Worth, Texas 76102

Re: UMTA Applications
Dallas Area Rapid Transit Authority South Oak Cliff Operating/Training Academy
(TX-03-0142)
Transit Centers
(TX-90-X103) Amendment t3
Purchase Buses, Vans, Bus Retrofit, Purchase Land for Garland Center, etc.
(TX-90-X193) Revised

Dear Mr. Hare:

This is in reply to the request from your office that we review the above captioned applications for grants under the Urban Mass Transportation Act of 1964, as amended.

The Dallas Area Rapid Transit Authority (DART) and the Amalgamated Transit Union (ATU) Local 1338 had previously agreed that the terms and conditions contained in a Resolution of DART's Board of Directors dated September 28, 1988, should be made applicable to certain projects. However, because the parties were unable to reach an agreement with re-

spect to the application and interpretation of that Resolution, they have failed to agree that the Resolution should be applied to the instant projects. After the Department met with the parties and determined that further mediatory efforts would not be productive, the Department asked the parties to submit position papers concerning the issues in dispute. The following is a discussion of the issues which concludes with the Department's certification of the instant projects.

DISCUSSION

"As a Result of the Project" Definition

The Department has ruled previously on this issue and its determination with respect to the pending projects is consistent with those earlier rulings. Therefore, paragraph (1)(b) Section 13(c) Arrangement shall include the phrase "events and actions which are as a result of Federal assistance under the Act." Also, the word "solely" shall be included in that paragraph. The revised version of the paragraph (1)(b) reads as follows:

> (b) The phrase "as a result of the Project" includes events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto and shall also include events and actions which are as a result of Federal assistance under the Act; provided, however, that volume rises and falls or business, or changes in volume and character of employment brought about solely by causes other than the Project (including any economies, or efficiencies unrelated to the Project), are not within the purview of this Arrangement.

Format of the Protections

For the sake of simplicity and ease of expressing the content of these protections, the Department has chosen to use the existing format.

Duty to Minimize Effects

The Department has also previously made a determination regarding the interpretation of the phrase "Duty to Minimize Effects." With respect to the instant projects, the Department finds no compelling reason to change its interpretation of that phrase. Consistent with our previous interpretation of the subject phrase, the Department has developed the following language for inclusion in the protections:

> The Project shall be performed and carried out in full compliance with the protective conditions described in this Arrangement and in such a manner and upon such terms and conditions as will not adversely affect employees covered by this Arrangement. The duty to minimize effects is not intended to preclude all actions which would adversely affect employees, but to balance such actions in favor of the interest of employees.

If the parties wish any additional guidance regarding this matter, they should consult pages 5 and 6 of the Rural Transportation Employee Protection Guidebook for a discussion of the Department's interpretation of this language.

"Departmental Rules" v. "Personnel Policies"

Consistent with the Department's November 15, 1990 letter, the term "Departmental Rules" is used to refer to the personnel policies of DART, exclusive of the General Grievance Procedure.

Preservation of Existing Rights, Privileges, and Benefits

The Department's repeated objective when making determinations during the process of certifying employee protective arrangements for DART, pursuant to Section 13(c), has been an attempt to preserve what was in existence at the Dallas Transit System (DTS) without diminishing or increasing the level of employee protections. Consistent with this objective, the Department will draw upon the language found in the previous DTS Section 13(c) Arrangement for this certification.

Fact Finding for All Modifications

While the Department will apply the principles contained in the existing Modifications procedure to the instant arrangements, the Department will add to the protective Arrangement a provision that will assure that DART cannot unilaterally alter the Modification procedure or the General Grievance procedure. By assuring that DART cannot unilaterally alter the Modification procedure or General Grievance procedure (currently contained in Sections 8.10 and 8.11 of DART'S Personnel Policies and Employee Benefits Manual), the Department is ensuring that the existing collective bargaining process available to DART employees shall be preserved.

ATU's Paragraph (3) (c) Arbitration Provision

With the existing collective bargaining process applicable to DART employees preserved, it is not necessary to provide an additional arbitration procedure for claims of violations of the protections contained in the Section 13(c) arrangements beyond that already existing in paragraph (16) of the Arrangement.

Standard for Triggering Notice

Although the parties have engaged in good faith discussions on the instant projects, they remain in disagreement concerning the language which addresses the standard for triggering notice of changes. Although the language concerning "major" changes which "will" affect a "significant" number of employees was the product of good faith discussions and was applied to previous grants, the parties are now unable to reach an agreement with respect to the interpretation of the language. Accordingly, the Department will impose a provision which is similar to that contained in the "Model" 13(c) Agreement dated June 23, 1975.

Employees Worsened and Make Whole Benefits

The Department has included language in Paragraph (7) (c) of the protective Arrangement which provides that an employee who is worsened as a result of the project shall be made whole. This language is consistent with what the Department has determined to be fair and equitable in the past. Arbitrators' awards must wholly compensate employees for the harm they suffer, but this does not always require the restitution of the precise benefit lost. Attempts should be made to provide such restitution, but alternative remedies may be acceptable when this is not possible and where the harm has an ascertainable economic value or where payment of damages would result in a fair and equitable substitute. The Department is confident that, notwithstanding Texas State law limiting labor negotiations to a "meet and confer" process, DART can meet the requirements set forth in the above referenced paragraph.

Burden of Proof Requirement

This is another case where the parties are in disagreement over language previously agreed to through good faith discussions. The Department has chosen to impose language which is a widely accepted standard in most Section 13(c) arrangements.

Arrangements To Be Imposed

It is not necessary for the parties to execute a formal agreement prior to certification of this project by the Department. However, the parties are encouraged to execute such an agreement prior to the approval of any subsequent DART grants of assistance.

Language in item three below indicates that employees represented by the ATU are intended third-party beneficiaries of the employee protection provisions of the grant contract. By executing the grant contract with the Department of Transportation (DOT), DART acknowledges that it assents to the terms therein. Agreement to the terms and conditions certified by the Department is a binding prerequisite to DOT's release of Federal assistance to DART.

This letter, which is applicable to the instant project, is also a part of the certified protective arrangements. If a dispute arises concerning the terms and conditions set forth in any part of the protective arrangements, this letter shall be used under paragraph (16) of the protective arrangement (Attachment A) to assist in the interpretation of the arrangements.

Accordingly, the Department of Labor makes the certification required in the Act with respect to the instant project on the condition that:

1. This letter, the terms and conditions of the Arrangement in Attachment A, and the Grievance procedure and Modification provision in Attachment B, shall be applied to the instant project and shall be made part of the contract of assistance by reference;

2. The term "project" as used in the Arrangement in Attachment A, shall be deemed to cover and refer to the instant project; and

3. The contract of assistance shall include the following language:

   "The terms and conditions of the aforementioned protective arrangements are intended for the primary and direct benefit of transit employees in the service area of the project. These employees are intended third-party beneficiaries to the employee protective arrangements of the grant contract between the Department of Transportation and the DART, and the parties to the contract so signify by executing that contract. The employees representative may assert claims on their behalf."

4. Employees of urban mass transportation carriers in the service area of the project, other than those represented by Amalgamated Transit Union Local 1338, shall be afforded substantially the same levels of protection as are afforded to the employees represented by ATU Local 1338 under the attached Arrangement and this certification. Should a dispute arise, after exhausting any available remedies under the Section 13(c) Arrangement and absent mutual agreement by the parties to utilize any final and binding procedure for resolution of the

dispute, the Secretary of Labor may designate a neutral third party or appoint a member of her staff to serve as arbitrator and render a final and binding determination.

Sincerely,

/s/ H. Charles Spring
H. Charles Spring
Acting Deputy Under Secretary

cc: Theodore Munter/UMTA
Earle Putnam/ATU
John Hoeft/DART
Anthony Anderson/ESC&M
Hal Gillespie/Gillespie & Rosen

Attachments

ATTACHMENT A

ARRANGEMENT PURSUANT TO SECTION 11(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964

WHEREAS, Dallas Area Rapid Transit Authority of Dallas, Texas ("Public Body") has made application under the Urban Mass Transportation Act of 1964 ("Act") for the transfer of certain mass transportation grants from the City of Dallas Transit System to the Public Body and for assistance for land acquisition and purchase of small transit buses, as more fully described in the project application ("Project"); and

WHEREAS, Section 13(c) of the Act requires, as a condition of any such assistance, that fair and equitable arrangements be made to protect the interests of employee who may be affected by such assistance;

NOW, THEREFORE, the Board of Directors of the Public Body hereby agrees to the following Arrangements:

(1) As used in this Arrangement:

(a) The term "Project" shall not be limited to the particular facility, service, or operation assisted by Federal funds from the Urban Mass Transportation Administration, but shall include any changes, whether organizational, operational, technological, or otherwise, which are as a result of the assistance provided; and

(b) The phrase "as a result of the Project" includes events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto and shall also include events and ac-

tions which are as a result of Federal assistance under the Act; provided, however, that volume rises and falls or business, or changes in volume and character of employment brought about solely by causes other than the Project (including any economies or efficiencies unrelated to the Project), are not within the purview of this Arrangement.

(2) The Project shall be performed and carried out in full compliance with the protective conditions described in this Arrangement and in such a manner and upon such terms and conditions as will not adversely affect employees covered by this Arrangement. The duty to minimize effects is not intended to preclude all actions which would adversely affect employees, but to balance such actions in favor of the interests of employees.

(3) All rights, privileges and benefits (including pension rights and benefits) of employees covered by this Arrangement accrued or which may hereafter accrue under the various retirement systems, and under the policies and working conditions in effect on the date of the Project, shall be preserved and continued; provided that any such rights, benefits and privileges may be improved, changed, or added to so long as there is no denial of accrued rights.

(4) The existing rights of employees covered by this Arrangement to present grievances concerning their wages, hours of work, or conditions of work, individually or through a representative, including any labor organization that does not claim the right to strike, under Article 5154c of Vernon's Annotated Civil Statutes of the State of Texas, as construed and applied in *Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Board*, No. 17097,

430 S.W.2d 107, *decided* May 31, 1968, by the Texas Court of Civil Appeals for the Fifth Supreme Judicial District (69 LRRM 2177) *rehearing denied* June 28, 1968, *writ ref'd. n.r.e.* February 26, 1969, *rehearing denied* April 16, 1969; *Dallas Independent School District v. American Federation of State, County and Municipal Emoloyees, Local Union No. 1442*, 330 S.W.2d 702 (Tex. Civ. App., *writ ref'd n.r.e.*, 45 LRRM 2815*); Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App., *writ ref'd n.r.e.*, 38 LRRM 2817) shall be preserved and continued.

(5) The employees covered by this Arrangement shall have the right to present grievances and to meet with the management of the Public Body, either individually or with their representatives, for the purposes of discussing and conferring with respect to any matter which concerns such employees, subject to the personnel policies of the public Body.

(6) (a) In the event the Public Body or other operator of the Dallas area transit system contemplates any change in the nature of its operation which may result in the dismissal or displacement of employees or a re-arrangement of the working forces of the system, as a result of the Project, the Public Body or other operator of the transit system shall give at least ninety (90) days' notice of such intended change by posting a notice on bulletin boards convenient to the interested employees and by providing written notice to the employee representative. Such notice shall contain a full and adequate statement of the proposed changes to be affected, including an estimate of the number of employees of each Classification affected by the intended changes.

(b) At the request of either the Public body or other operator or of the employees individually or

through a representative, made within thirty (30) days after the date of notice under subparagraph (a), the parties shall meet for the purpose of discussing the application of the terms and conditions of this Arrangement to the intended change. Any such change involving a dismissal, displacement, or re-arrangement of the working forces or the employees covered by this Arrangement provide for the selection of forces from the employees on the basis accepted as appropriate for application in the particular case, and any assignment of employees made necessary by the intended changes shall be made in accordance with the terms and intent of this Arrangement. In the event of failure to agree within 30 days after the commencement of the discussion, the dispute may be submitted by any party to determination pursuant to paragraph (16) of this Arrangement. In any such determination, the terms of this Arrangement are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to section 11347 of title 49, United States Code (formerly section 5(2)(f) of the Interstate Commerce Act).

(7) (a) Whenever an employee retained in service, recalled to service or employed by the Public Body pursuant to paragraphs (6), (8)(e), or (9) is placed in a worse position with respect to compensation as a result of the Project, such employee shall be considered a "displaced employee" and shall be paid a monthly "displacement allowance" to be determined in accordance with this paragraph. Such displacement allowance shall be paid during the protected period following the date on which the employee is first displaced, so long as the employee is unable, in the normal exercise of such employee's seniority rights, to obtain a position producing compensation equal to

or exceeding the compensation of the position from which such employee was displaced, adjusted to reflect subsequent general wage adjustments, including cost of Living adjustments where provided for. Notice concerning such positions shall be posted on bulletin boards convenient to the interested employees.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee, including vacation allowances, pay for time lost on account of on-the-job injury, and monthly compensation guarantees, and the employee's total time paid for the past twelve (12) months in which such employee performed compensated service more than fifty percentum of each such months, based upon such employee's normal work schedule immediately preceding the date of displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation and the average monthly time paid for. If the employee's length of service is less than twelve (12) months, the average monthly compensation and average monthly time paid for, shall be computed by dividing separately the total compensation and total time paid by the number of months in which such employee performed compensated service more than fifty percentum of each such months. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost-of-living adjustments where provided for. if the displaced employee's compensation in such employee's current position is less in any month in which such employee performs work than the aforesaid average compensation (adjusted to reflect subsequent general warm adjustments, including cost-of-living adjustments where provided for), such em-

ployee shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that such employee is not available for service equivalent to such employee's average monthly time, but such employee shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. If a displaced employee fails to exercise such employee's seniority rights to secure another position to which such employee is entitled under the then-existing personnel policies and which carries a wage rate and compensation exceeding those of the position which such employee elects to retain, such employee shall thereafter be treated, for the purposes of this paragraph, as occupying the position such employee elects to decline. In computing the allowance under this paragraph, extraordinary amounts of overtime due to circumstances beyond the control of the Public Body shall be excluded from the compensation, but overtime which is normal, usual, and customary for the job concerned shall be included.

(c) Any employee placed in a worse position with respect to hours, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during the employee's employment as a result of the Project shall be considered a "worsened employee," and shall be made whole. Reasonable efforts should be made to restore the precise benefit lost or affected. If such attempts are unsuccessful; or unsuitable, an alternative remedy awarding offsetting benefits or compensatory damages may be acceptable if the harm has a readily ascertainable economic value and such an award would result in a fair and equitable substitute.

(d) The displacement allowance and/or other make whole remedy shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for cause.

(8) (a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, such employee shall be considered a "dismissed employee" and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph. This dismissal allowance shall be first paid each dismissed employee not later than the 30th day following the date on which such employee is "dismissed" and continue payable monthly for the following periods of time:

Employee's Length of Service Prior to Adverse Effect	Period of Payment
One day to 6 years	Equivalent period
6 years or more	6 years

During the 6-year period following the date on which the employee is deprived of employment, the monthly dismissal allowance shall be equivalent to one-twelfth of the compensation received by such employee in the last twelve (12) months of such employee's employment in which such employee performed compensation service more than fifty percentum of each such months based on such employee's normal work schedule to the date on which such employee was first deprived of employment as a result of the Project. If the employee's length of service is less than twelve (12) months, the monthly dismissal allowance shall be computed dividing the total compensation by a number equal to the number

of months of the employee's employment in which such employee performed compensated service more than fifty percentum of each such months based on such employee's normal work schedule to the date on which such employee was first deprived of employment as a result of the Project. If the employee's length of service is less than twelve (12) months, the monthly dismissal allowance shall be computed by dividing the total compensation by a number equal to the number of months of the employee's employment in which such employee performed compensated service more than fifty percentum of each such months based on such employee's normal work schedule to the date on which such employee was first deprived of employment as a result of the Project. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost-of-living adjustments where provided for.

(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position such employee holds is abolished as a result of the Project and such employee is unable to obtain another position by the exercise in due diligence of such employee's seniority rights; or, when the position such employee holds is not abolished but such employee loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of the Project, or as a result of the exercise of seniority rights by other employees brought about as a result of the Project. Any such deprivation of employment which occurs as a result of an agreement reached or determination rendered in accordance with 'these employee protective arrangements which require a selection from, or reassignment of, the working forces, shall not be

deemed to be any less a result of the Project by reason of such agreement or determination. In the absence of proper notice of an intended change, and an agreement or determination made specifying arrangements for the selection from, or reassignment of, the working forces, as required by the protective conditions applicable to the Project, no employee who has been deprived of employment as a result of the Project shall be required to exercise such employee's for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Public Body informed as to such employees current address and the current name and address of any other person by whom such employee may be regularly employed, or if such employee is self-employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when the employee is absent from service, the employee will be entitled to the dismissal allowance when the employee is available for service. The employee temporarily filling such position at the time it was abolished will be given a dismissal allowance on the basis of that position, until the regular employee is available for service, and thereafter shall revert to the previous status and will be given the protections of this Arrangement in such position, if any are due.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by the Public Body after being notified in accordance with the terms of the then-existing personnel policies, and such employee may be required to return to service of the Public Body for other reasonably comparable employment for which such employee is physically and

mentally qualified, or for which such employee can become qualified after a reasonable training or retraining period, provided. it does not require a change in residence or infringe upon the employment rights of other employees of the Public Body. An employee who accepts other reasonably comparable employment will not thereby lose such employee's seniority rights applicable to the position such employee occupied at the time such employee was deprived of employment, nor will such rights be otherwise adversely affected.

(f) When an employee who is receiving a dismissal allowance returns to service pursuant to subparagraph (e) or paragraph (19), such allowance shall cease while such employee is so re-employed and the period of time during which such employee is so re-employed shall be deducted from the total period for which such employee is entitled to receive a dismissal allowance. During the time of such re-employment, the employee shall be entitled to all other applicable provisions of this Arrangement.

(g) The dismissal allowance of any employee who is otherwise employed shall be reduced to the extent that such employee's combined monthly earnings from such other employment or self-employment, any benefits received under any unemployment insurance law, and such employee's dismissal allowance exceed the amount upon which the dismissal allowance is based. Such employee, individually or through a representative including a labor organization, and the Public Body shall agree upon a procedure by which the Public Body shall be currently informed of such employee's former employer, including self employment, and the benefits received.

(h) The dismissal allowance shall cease prior to its normal expiration date, as prescribed in paragraph (8)(a), in the event of the failure of the employee without good cause to return to service in accordance with the personnel policies of the Public Body, or to accept employment in accordance with subparagraph (e) or paragraph (19), or in the event of such employee's resignation, death, retirement, or dismissal for cause in accordance with such personnel policies.

(i) A dismissed employee receiving a dismissal allowance shall actively seek and not refuse other reasonably comparable employment offered for which the employee is physically and mentally qualified and which does not require a change in residence. Failure of the dismissed employee to comply with this obligation shall be grounds for discontinuance of the employee's allowance; provided that such dismissal allowance shall not be discontinued until final determination is made either by agreement between the Public Body and the employee or such employee's representative, or by a determination rendered in accordance with paragraph (16) of this Arrangement, that such employee did not comply with this obligation.

(9) In determining length of service of a displaced, dismissed or worsened employee for purposes of this Arrangement, the employee shall be given full service credits in accordance with the records and personnel policies applicable to such employee and shall be given applicable service credits for each month in which such employee receives a dismissal or displacement allowance as if such employee were continuing to perform services in the employee's former position.

(10) No employee shall be entitled to allowance under paragraphs (7) or (8) because of the abolishment of a position to which, at some future time, such employee could have bid, or to which such employee could have been transferred or promoted.

(11) No employee receiving a dismissal or displacement allowance shall be deprived, during such employee's protected period, of any rights, privileges, or benefits attaching to such employee's employment, including without limitation group life insurance, hospitalization, and medical care, free transportation for the employee and the employee's family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Worker's Compensation, and unemployment compensation, as well as any other benefits to which such employee may be entitled under the same conditions and so long as such benefits continue to be accorded to other employees of the Public Body, in active service or furloughed, as the case may be.

(12) (a) Any employee covered by this Arrangement who is retained in service or who was later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of employment in order to retain or secure active employment with the employer and is thereby required to make a change in residence, shall be reimbursed, for all expenses of moving such employee's household and other personal effects, for the travelling expense of such employee and such employee's immediate family, including living expenses for such employee and such employee's immediate family, and for such employee's own actual wage loss during the time necessary for such transfer, and for a reasonable time

thereafter (not to exceed 5 working days) used in securing a place of residence in such employee's new location. The exact extent of the responsibility of the Public Body under this paragraph, and the ways and means of transportation, shall be agreed upon in advance between the Public Body and the employee affected.

(b) If any such employee is furloughed within three years after changing his point of employment in accordance with paragraph (13)(a), and elects to move such employee's place of residence back to such employee's original place of employment, the Public Body shall assume the expense of moving the household and other personal effects under the provisions of subparagraph (a).

(c) No claim for reimbursement shall be paid under this paragraph unless such claim is presented to the Public Body within ninety (90) days after the date the expenses were incurred.

(d) Expect as otherwise provided in this paragraph, changes in place of residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(13) (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the Public Body (or who was later restored to service after being entitled to receive a dismissal allowance) and who was required to change the point of employment in order to retain or secure active employment with such employee's employer, within such employee's protected period and as a result of the Project, and is, thereby, required to make a change in residence; pro-

vided, however, that these conditions shall not apply where the change of the point at which the employee is employed results in bringing the point nearer such employee's place of residence.

(1) If the employee owns a home in the locality from which the employee is required to move, such employee shall, at such employee's option, be reimbursed by the Public Body for offered in the for less than its fair market value, plus conventional fees and closing costs, such loss to be paid within thirty (30) days of the sale of the home. In each case, the fair market value of the home in question shall be determined, as of a date sufficiently prior to the date of the Project, so as to be unaffected thereby. The Public Body shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person and to reimburse the seller for the seller's conventional fees and closing costs.

(2) If the employee is under a contract to purchase the home, the Public Body shall protect the employee against loss under such contract and, in addition, shall relieve the employee from any further obligation thereunder.

(3) If the employee holds and unexpired lease of a dwelling occupied by such employee as home, the Public Body shall protect the employee from all lose and costs in securing the cancellation of such lease.

(b) Changes in place of residence which are made subsequent to the initial changes as a result of the Project, and which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(c) No claim for loss shall be paid under the provisions of this paragraph unless such claim is presented to the Public Body within one year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or the employee's representative and the Public Body. In the event they are unable to agree, the dispute or controversy may be referred by the Public Body or the employee or employee's representative to a board of competent real estate appraisers, selected in the following manner: one to be selected by the employee or employee's representative and one by the Public Body, and these two, if unable to agree within thirty (30) days upon a valuation, shall endeavor by agreement within ten (10) days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected and failing such agreement, either party may request the state or local real estate board or commission, or comparable body, to designate within ten (10) days a third appraiser, whose designation will be binding upon the parties and whose jurisdiction shall be limited to determination of the issues raised by this paragraph only. A decision of a majority of the appraisers shall be re-

quired and such decision shall be final and binding. The salary and expenses of the neutral appraiser, including expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expense shall be paid by the party incurring them, including compensation of the appraiser selected by such party.

(e) "Change in residence" means, transfer to a work location which is either (1) outside a radius of twenty (20) miles of the employee's former work location and farther from the employee's residence than was such employee's former work location, or (2) is more than thirty (30) normal highway route miles from the employee's residence and also farther from the employee's residence than was such employee's former work location.

(14) A dismissed employee entitled to protection under these Arrangements may, at the employee's option within thirty (30) days of dismissal, resign and (in lieu of all other benefits and protections provided by this Arrangement) accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May 1936.

Length of Service	Separation Allowance
1 year and less than 2 years	3 months' pay
2 years and less than 3 years	6 months' pay
3 years and less than 5 years	9 months' pay
5 years and less then 10 years	12 months' pay
10 years and less than 15 years	12 months' pay
15 years and over	12 months' pay

In the case of an employee with less than one year's service, five days' pay, computed by multiplying by 5 the normal daily earnings (including regularly sche-

duled overtime, but excluding other overtime payments) received by the employee in the position last occupied, for each month in which the employee performed service, will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 7(b) of the Washington Job Protection Agreement, as follows:

> For the purpose of this Arrangement, the length of service of the employee shall be determined from the date the employee last acquired an employment status with the employer and the employee shall be given credit for one month's service for each month in which such employee performed any service (in any capacity whatsoever) and twelve (12) such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization, the employee will be given credit for performing service while so engaged on leave of absence from the service of the employer.

(b) One month's pay shall be computed by multiplying by thirty (30) the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied prior to time of the employee's dismissal as a result of the Project.

(15) As used in this Arrangement, unless the context requires otherwise, the term "protected period" means that period of time during which a displaced

or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of six (6) years therefrom; provided, however, that the protected period for any particular employee during which such employee is entitled to receive the benefits of these provisions shall not continue for a longer period following the date such employee was displaced or dismissed than the employee's length of service as shown by the records and personnel policies applicable to such employee's employment prior to the date of displacement or dismissal.

(16) (a) Any dispute or controversy arising between any employees covered by this Arrangement and the Public Body, regarding the application, interpretation, or enforcement of the provisions of this Arrangement (not otherwise governed by paragraph 13(d) of this Arrangement) which cannot be settled within thirty (30) days after the dispute or controversy first arises, may be submitted at the written request of the Public Body or the employee, individually or through such employee's representative, to any final.. and binding disputes procedure acceptable to the parties, or in the event they cannot agree on such procedure, to the Department of Labor, or its designee, for purposes of final and binding determination of all matters in dispute. The Public Body will post in a prominent and accessible place where employees of the Public Body are employed, a notice informing such employees that the Public Body is a recipient of Federal assistance under the Act, and that the Public Body has agreed to comply with the provisions of Section 13(c). The notice shall also include a copy of this Arrangement and inform employees of their rights to refer claims and disputes arising thereunder to the Department of Labor for determina-

tion. The Public Body shall maintain and keep on file all relevant books and records in sufficient detail as to provide the basic information necessary to the determination of claims arising under these conditions.

(b) In the event of any dispute as to whether or not a particular employee was affected as a result of the Project, it shall be the obligation of the employee to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the Public Body's burden to establish affirmatively that such effect was not a result of the Project, by proving that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee, even if other factors may also have affected the employee.

(17) Nothing in this Arrangement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or under any provision of law, including Public Law 93-236, enacted January 2, 1974; provided that there shall be no duplication or pyramiding of benefits to any employee and provided further that any benefit under this Arrangement shall be construed to include the conditions, responsibilities, and obligations accompanying such benefit. This paragraph shall be construed consistent with the Hodgson Affidavit in Civil Action No. 825-71 and the federal court's interpretation of the concept of 'pyramiding' in *New York Dock Railway v. U.S.*, 609 F.2d 83, 99-101 (2d Cir. 1979).

(18) (a) The Public Body shall be financially responsible for the application of these conditions, and will make the necessary arrangements so that any

employee affected as a result of the Project may, individually or through such employee's representative, file a claim with the Public Body within sixty (60) days of the date the employee is terminated or laid off as a result of the Project or within eighteen (18) months of the date the employee's position with respect to the employee's employment is otherwise worsened as a result of the Project. If the events giving rise to a worsening claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event; provided, however, that no benefits shall be payable for any period prior to six (6) months from the date of the filing of the claim. Unless such claims are filed with the Public Body within such time limitations, the Public Body shall thereafter be relieved of all liabilities and obligations related to such claims.

(b) The Public Body shall either honor a claim filed under subparagraph (a) by making appropriate payments or give notice to the claimant of its basis for failing to honor such claim, giving reasons therefore. In the event the Public Body honor such claim the or the claimant's designated representative may invoke the following procedures for further joint investigation of the claim by giving notice in writing of its desire to pursue such procedures. Within ten (10) days from receipt by the Public Body of such notice, the parties shall exchange such relevant factual information in their possession as may be requested of them, and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual information as may be relevant. As soon as practicable thereafter, the parties shall meet and attempt to agree upon the proper disposition of the claim. If no such agreement is reached, and the Public Body decides to reject the claim, it

shall give written notice of its final rejection of the claim, detailing its reasons therefore. In the event the claim is so rejected by the Public Body, the claim may be processed as provided in paragraph (16).

(19) (a) During the employee's protected period, a dismissed employee shall, if the employee so requests in writing, be granted priority of employment to fill any vacant position within the jurisdiction and control of the Public Body reasonably comparable to that which the employee held when dismissed, for which the employee is, or by training or retraining can become, qualified; not, however, in contravention of current personnel policies relating thereto. In the event such employee requests such training or retraining and fills such vacant position, the Public Body shall provide for such training or retraining at no cost to the employee. The employee shall be paid the salary or hourly rate provided for in the personnel policies of the Public Body, plus any displacement allowance and/or make whole remedy to which such employee may otherwise be entitled. If a dismissed employee who has made such request fails, without good cause, within ten (10) days to accept an offer for which the employee is qualified or for which the employee has satisfactorily completed such training, such employee shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this Arrangement. On-the-job training and instructions shall also be given to such employees retrained in service if the Project involves the acquisition, installation, or use of new or upgraded equipment on which the employees require additional training

(b) As between employees who request employment pursuant to this paragraph, the following order shall prevail where applicable in hiring such

employees, subject to any existing affirmative action plan or hiring plan designed to eliminate discrimination:

(1) Employees in the craft or class of the vacancy shall be given priority over employees without seniority in such craft or class; As between employees having seniority and the craft or class of the vacancy, the senior employees, based upon their service in that craft or class as shown on the appropriate seniority roster, shall prevail over junior employees;

(2) As between employees not having seniority in the craft or class of the vacancy, the senior employees, based upon their service in the craft or classes in which they do have seniority as shown on the appropriate seniority rosters, shall prevail over junior employees.

(20) No provisions, terms, or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by reason of the arrangements made by or for the Public Body for the management and operation of the System. Any person, enterprise, body, or agency, whether Publicly or privately owned, which shall undertake the management and operation of the system, shall agree to be bound by this Arrangement and accept the responsibility for full performance of these conditions; provided, however, that this paragraph shall not create any personal liability on the Public Body board members or elected officials of the system.

(21) The employees covered by this Arrangement shall continue to receive any applicable coverage under Social Security, Railroad Retirement, Worker's Compensation, unemployment compensation, and the

like. In no event shall these benefits be worsened as a result of the Project.

(22) If any employer of the employees covered by this Arrangement shall have rearranged or adjusted its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which such employee should be entitled under this Arrangement, the provisions of this Arrangement shall apply to such employee as of the date when such employee was so affected.

(23) In the event any provision of this Arrangement is held to be invalid or otherwise unenforceable under Federal, state, or local law, in the context of a particular Project, the remaining provisions of this Arrangement shall not be affected and the invalid or unenforceable provision shall be discussed by the Public Body and the employees or their representatives, including any labor organization, are unable to reach a mutually satisfactory arrangement, any party may invoke the jurisdiction of the Department of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this Arrangement only as applied to that Project, and any other appropriate action, remedy, or relief.

(24) In the event any Project to which this Arrangement applies is approved for assistance under the Act, the foregoing terms and conditions shall be made a part of the contract of assistance between the Federal Government and the applicant for Federal funds.

ATTACHMENT B

8.10 General Grievances

Employees of the Dallas Area Rapid Transit ("the Authority" or "Public Body"), individually or through their representatives, will be provided the opportunity to present general grievances in accordance with this Section. This Section applies to all employees of the Authority with the exception of the Executive Director, Assistant to the Executive Director, Assistant Executive Directors, and the General Counsel.

A. The general grievance procedures described in this Section are provided for the purpose of giving an employee, individually or through such employee's representative, the opportunity to present grievances and appeals regarding establishment of, or failure to establish, specified wages, hours or conditions of work which are designated as "general" as provided in Section 6 of Article 5154c.

B. All general grievances must be first presented in writing to the Assistant to the Executive Director. The Assistant to the Executive Director, within a reasonable time thereafter, shall meet with the grievant and such grievant's representative and provide the grievant a full hearing and review of the grievance. Following the discussion, the Assistant to the Executive Director shall, within a reasonable time, provide a written decision to the grievant and the grievant's representative.

C. (1) Any dispute that remains following the decision of the Assistant to the Executive Director may be appealed by the grievant, individually or through such grievant's representatives, to

the Executive Director or may be submitted in writing by the grievant, individually or through such grievant's representatives, directly to fact-finding in accordance with the following procedures.

(2) Fact-finding shall be conducted by a three-member panel to be selected as follows:

(a) within three (3) working days after submission of the matter in dispute, one member to be appointed by the Assistant to the Executive Director and one member to be appointed by the grievant or the grievant's representative, and

(b) within ten (10) days after fact-finding is requested, the parties shall take all reasonable steps to identify a list of potential neutral neutral fact-finder within those ten (10) days, a neutral fact-finder shall be selected by the parties by alternately striking names from a list of nine (9) qualified and available persons maintained and made available at the request of either party by the Federal Mediation and Conciliation Service. The parties shall determine by lot the order of striking from the list.

(3) The fact-finding panel shall gather facts and make recommendations for the resolution of outstanding issues. Each party shall, within ten (10) days after the neutral fact-finder accepts his/her appointment, submit to the other party and to the fact-finding panel an itemized listing of all unresolved issues to be submitted to fact-finding and their respec-

tive positions on those issues. The fact-finding hearings shall begin not earlier than fifteen (15) days nor later than thirty (30) days after fact-finding is requested, subject to the availability of the fact-finding panel. The hearing shall be limited to not more than five (5) days. The fact-finding panel shall have no authority to mediate the dispute. All individually incurred costs shall be borne by the party incurring them. The cost for the services of the impartial fact-finder, including per diem expenses, if any, and actual and necessary travel and subsistence expenses, and any other necessary expenses of the fact-finding proceedings, shall be borne equally by the parties.

(4) The fact-finding panel shall issue a written report and cause such to be received by the parties within fourteen (14) days after the completion of any hearing. The report shall make final recommendations as to all unresolved issues and shall set forth the supporting factual findings.

(5) In making findings and recommendations for the resolution of the matter, the fact-finding panel shall take into consideration and give weight to the following factors in determining its recommendations:

(a) Stipulations of the parties.

(b) The interest and welfare of the public, ability of the Authority to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service.

(c) Comparison of the wages, hours, fringe benefits, and other terms and conditions of employment of the Authority's employees with the wages, hours, fringe benefits, and other terms and conditions of employment of other public and private employees during comparable work, giving consideration to factors peculiar to the community or area and classification involved.

(d) The overall compensation presently received by the employees including direct wages, fringe benefits, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, and all other benefits received.

(e) The relevant Personal Policies and the Section 13(c) Arrangement.

(f) Such other factors not confined to those noted above which are normally and traditionally taken into consideration in determination of issues submitted to mutually agreed upon dispute settlement procedures in public or private employment.

(g) Such other factors as may be agreed upon by all parties prior to the close of the hearing.

(6) Not later than seven (7) days after release of the fact-finding panel's report, exclusive of Saturdays, Sundays, and legal holidays, either panel member representing management or the grievant may file a dissenting opinion; if neither files a dissent, the rec-

ommendations shall be deemed agreed upon as a final resolution of the issues submitted, except as otherwise modified by the parties' mutual agreement. The fact-finding panel shall have published in the local media its findings of fact and recommendations for settlement and the statements of position provided to the fact-finding panel by the parties together with any dissenting opinions.

(7) The parties may, by mutual written agreement, alter any time limits set forth therein.

(8) Nothing herein shall prevent the parties from engaging in further discussion of any unresolved issues at any time.

(9) Except as provided in subparagraphs (b)(6), the fact-finding report and recommendations shall be advisory only.

(10) Absent written mutual agreement by the parties to the contrary (such agreement not prejudicing either party's rights or position under this procedure) no modifications shall take place until the fact-finding panel's report and recommendations are accepted or until final action of the Board of Directors of the Public Body, whichever is earlier.

8.11 Modification

The Deputy Executive Director may modify, as they apply to Authority employees, the personnel rules of the City of Dallas, the Personnel Policies and Employees Benefits Manual of the Dallas Transit System (effective October 1, 1984), and the personnel rules of the Authority (hereinafter "departmental rules" except this section and the General Grievance

Procedure. Further, any such initiative to make modifications must provide for the notification of employees and/or their representatives in advance and given them an opportunity to present their views. Any proposed change of the departmental rules is subject to hearing and review by the Executive Director or his/her designee before implementation upon request by employees or their representatives. Further, employees and/or their representative may propose modifications of the departmental rules to the Deputy Executive Director or his/her designee.

APPENDIX L

STATE OF TEXAS
COUNTY OF DALLAS

CERTIFICATION OF
PUBLIC RECORD

By attachment of its seal below, Dallas Area Rapid Transit hereby certifies that the documents attached hereto *(sections 8.8(a) and 8.10 of the hourly employment manual)* are public records of Dallas Area Rapid Transit and are maintained pursuant to its governmental functions, powers and responsibilities as a regional transportation authority under Texas Transportation Code chapter 452. These said pages of records are kept by Dallas Area Rapid Transit, in the regular course of its governmental duties, and it was the regular course of said governmental duties of Dallas Area Rapid Transit for an employee or representative of Dallas Area Rapid Transit with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

[SEAL]

/s/ LYNDA JACKSON
LYNDA JACKSON
VICE-PRESIDENT
HUMAN RESOURCES

e. The finality of the action if the employee fails to appeal within the specified time.

8.8. Purpose

A. The grievance and appeal procedure described in this article is provided for the purpose of giving an employee, individually or through such employee's representative, the opportunity to:

1. Present a grievance and appeals regarding establishment of, or failure to establish, specified wages, hours or conditions of work that are designated as "General" grievances as provided for in Section 6 of Article 5154c now codified as 617.005 of the Local Government Code.

2. Present individual grievance and appeals asserting that the grievant has been adversely affected by a violation, misinterpretation, or inequitable application of an existing law, ordinance, resolution, policy, rule, or regulation as it applies to the conditions of employment, or regarding disciplinary action without just cause other than those involving discharge or demotion.

3. Present other individual grievance or appeals regarding disciplinary action without just cause resulting in discharge or demotion of the grievant.

4. (This paragraph on presenting a grievance and appeals claiming discrimination in employment has been eliminated.)

5. Present a group grievance or appeal as to any of the above.

B. Terms and Conditions

1. The determination by DART that a grievance is a "General Grievance" and therefore not subject to the jurisdiction of the Trial Board is appealable in accordance with Section 8.11., Dispute Resolution Procedure for General Grievance Determinations.

2. A grievance or an appeal will be heard during regularly scheduled working hours without loss of pay to the employee.

3. Preparation of a grievance or appeal, except for seeking assistance from Human Resources or a similar departmental unit, is not permitted during the employee's working hours.

4. An employee must be willing to discuss the evidence and answer questions concerning the grievance or appeal at each step. Failure to discuss the facts of the case at any level of this procedure will constitute withdrawal of the grievance or appeal and will cause the last decision rendered to become final.

8.10. General Grievance

Employees of the Authority, individually or through their representatives, will be provided the opportunity to present general grievances in accordance with this section.

A. All General Grievances must be first presented in writing to the Human Resources department head, who shall, within a reasonable time thereafter, meet with the grievant and such grievant's representative and provide the grievant a full hearing and review of the grievance. Following the discussion, the Human Resources department head shall, within a reasonable time,

provide a written decision to the grievant and the grievant's representative.

B. Dispute Fact-Finding

1. Any dispute that remains following the decision of the Human Resources department head may be appealed by the grievant individually or through such grievant's representative to the President/Executive Director or may be submitted directly to fact-finding in accordance with the following procedures.

2. Fact-finding shall be conducted by a three-member panel to be selected as follows:

   a. Within three working days after submission of the matter in dispute, one member to be appointed by the Human Resources department head and one member to be appointed by the grievant or representative.

   b. Within 10 days after fact-finding is requested in writing to the President/Executive Director, the parties shall take all reasonable steps to identify a list of potential, neutral fact-finders who will be available for such service. If the parties have not agreed upon a neutral fact-finder within those 10 days, a neutral fact-finder shall be selected by the parties by alternately striking names from a list of nine qualified and available persons maintained and made available at the request of either party by the Federal Mediation and Conciliation Service. The parties shall determine by lot the order of striking from the list.

3. The fact-finding panel shall gather facts and make recommendations for the resolution of the outstanding issues. Each party shall, within 10 days after the neutral fact-finder accepts his/her appointment, submit to the other party and to the fact-finding panel an itemized listing of all unresolved issues to be submitted to fact-finding and their respective positions on those issues. The fact-finding hearings shall begin not earlier than 15 days nor later than 30 days after fact-finding is requested, subject to the availability of the fact-finding panel. The hearing shall be limited to not more than five days. The fact-finding panel shall have no authority to mediate the dispute. All individually incurred costs shall be borne by the party incurring them. The cost for the services of the impartial fact-finder, including per diem expenses, if any, and actual and necessary travel and subsistence expenses, and any other necessary expenses of the fact-finding proceedings, shall be borne equally by the parties.

4. The fact-finding panel shall issue a written report and cause such to be received by the parties within 14 days after the completion of the hearing. The report shall make final recommendations as to all unresolved issues and shall set forth the supporting factual findings.

5. In making findings and recommendations for the resolution of the matter, the fact-finding panel shall take into consideration and give weight to the following factors in determining its recommendations:

   a. Stipulations of the parties.

b. The interest and welfare of the public, ability of DART to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service.

c. Comparison of the wages, hours, fringe benefits, and other terms and conditions of employment of the DART employee with the wages, hours, fringe benefits, and other terms and conditions of employment of other public and private employees doing comparable work, giving consideration to factors peculiar to the community or area and classification involved.

d. The overall compensation presently received by the employees, including direct wages, fringe benefits, vacations, holidays, and other excused time, insurance, pensions, medical and hospitalization benefits, and all other benefits received.

e. The relevant Personnel Policies and Section 13(c) arrangements.

f. Such other factors not confined to those noted above which are normally and traditionally taken into consideration in determinations of issues submitted to mutually agreed upon dispute settlement procedures in public or private employment.

g. Such other factors as may be agreed upon by all parties prior to the close of the hearing.

6. Not later than seven days after release of the fact-finding panel's report, exclusive of Saturdays, Sundays, and legal holidays, either panel

member representing management or the grievant may file a dissenting opinion. If neither files a dissent, the recommendations shall be deemed agreed upon as a final resolution of the issues submitted, except as otherwise modified by the mutual agreement of the parties. The fact-find panel shall have published in the local media its findings of act and recommendations for settlement and the statements of position provided to the fact-finding panel by the parties, together with any dissenting opinions.

7. The parties may, by mutual written agreement, alter any time limits set forth herein.

8. Nothing herein shall prevent the parties from engaging in further discussion of any unresolved issues at any time.

9. The fact-finding report and recommendations shall be advisory' only and shall not be binding on either party.

10. Absent written mutual agreement by the parties to the contrary (such agreement not prejudicing either party's rights or positions under this procedure) no modifications shall take place until the fact-finding panel's report and recommendations are accepted or until final action of the DART Board of Directors, whichever is earlier.

8.11. Dispute Resolution Procedure for General Grievance Determinations

A. A grievance that has been determined by DART to be a "General Grievance" and that has been submitted to the Secretary of the Trial Board for filing shall be returned to the employee

(and the employee's representative if applicable). An employee or employee's representative who has a grievance returned by the Secretary of the Trial Board as a "general grievance" may appeal the determination that the grievance is "general" by submitting the appeal to the Secretary of the Trial Board within forty-five (45) calendar days from receipt of the determination. An employee or employee's representative may submit more than one appeal to the Secretary of the Trial board simultaneously. However, no more than two appeals may be combined. In order to combine more than two appeals for simultaneous submission, the mutual consent of all parties is required. The appeals that are combined for simultaneous submission shall be processed as a single proceeding.

B. Within ten (10) working days of the receipt of an appeal regarding the determination that a grievance is "general", the Secretary of the Trial board shall submit a request to the American Arbitration Association in Dallas, Texas (AAA) for a list of fifteen (15) qualified and available persons from the American Arbitration Association's Panel of Labor Arbitrators who are members of the National Academy of Arbitrators. Within ten (10) working days after receipt of the list of arbitrators, the parties shall select a neutral arbitrator from the list by alternatively striking the names. The winner of a coin toss has the right to strike first or to insist that the other party strike first.

C. The arbitrator selected by the parties shall determine whether the grievance is "general". The jurisdiction and authority of the arbitrator is li-

mited to resolving the issue of whether the grievance is "general" or "individual" as defined by section 8.8 of the HEM. In the case of a combined arbitration due to more than one appeal being submitted to the Secretary of the Trial Board simultaneously, the arbitrator shall . . .

APPENDIX M

IN THE DISTRICT COURT
191st JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

[Filed NOV. 12, 2004]

CAUSE NO. 04-06740-J

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendants.

PLAINTIFF'S SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Amalgamated Transit Union Local No. 1338 ("ATU 1338" or "Plaintiff"), and files this its Amended Original Petition for damages and equitable relief, complaining of Defendant Dallas Area Rapid Transit ("DART" or "Defendant"), and for cause of action respectfully shows the following:

I. DISCOVERY

1. Discovery in this case shall be conducted under Level 2 of Rule 190, Texas Rules of Civil Procedure.

II. JURISDICTION AND VENUE

2. Plaintiff has fulfilled all of the jurisdictional requirements prior to bringing this suit. Jurisdiction of the Dallas County District Court is proper pursuant to Section 24.007 of the Texas Government

Code. DART does not have governmental immunity as the legislature has expressly waived immunity pursuant to Section 452.054 of the Texas Transportation Code.

3. Venue is proper in Dallas County, Texas, pursuant to Section 15,002 of the Texas Civil Practice & Remedies Code in that a substantial part of the events or omissions giving rise to the claims described herein occurred in Dallas County, Texas. Additionally, DART conducts and transacts business in Dallas County, Texas, and maintains an office in Dallas County, Texas.

III. PARTIES

4. Plaintiff ATU 1338 is a labor organization representing employees (e.g. bus drivers) of DART. ATU 1338's primary purpose and objective is to identify employment concerns and problem areas of transit workers of DART and to improve all aspects of the work environment of transit workers, including the establishment of clear, concise, and fair employment policies, practices, and procedures.

5. Defendant DART is a regional transportation authority organized and existing under Texas Transportation Code, Chapter 452, having its principle place of business in Dallas County, Texas. DART may be served with citation in this action by serving its agent for service of citation: Gary Thomas, President Executive Director of DART, 1401 Pacific Avenue, Dallas, Texas 75202.

IV. FACTUAL BACKGROUND

6. On April 24, 2001, in accordance with Section 8.10 of the DART Hourly Employment Manual ("HEM"), ATU 1338 filed a "General Group Grievance" on behalf of its bargaining unit members.

7. In order to address the grievance, and in conformity with Section 8.10 of the DART HEM, Section 617.005 of the Government Code, and DART's 13(c) Capital Arrangement certified by the Department of Labor on September 30, 1991, the parties (DART and ATU 1338) met and conferred to address the grievance issues.

8. As a result of the meeting regarding the grievance issues, DART and ATU 1338 entered into a General Grievance Resolution ("Resolution Agreement") which was ratified and signed by Gary Thomas, President Executive Director of DART, Roland Castaneda, General Counsel for DART, and Kenneth Kirk, then presiding President and Business Agent for ATU 1338. A true and correct copy of the Resolution Agreement is attached hereto as Exhibit A.

9. Paragraph B of the Resolution Agreement provides for increases in the "Salaries and Wages for Operating Employees." Paragraphs B(1-3) specifically provide:

1. Effective the first full pay period in October 2001, each hourly employee who is in an active pay status **shall** receive a general pay increase of four percent (4%).
2. Effective the first full pay period in October 2002, each hourly employee who is in an active pay status **shall** receive a general pay increase of four percent (4%).
3. Effective the first full pay period in October 2003, each hourly employee who is in an active pay status **shall** receive a general pay increase of four percent (4%).

(emphasis added).

10. Paragraph P of the Resolution Agreement establishes that the terms of the Resolution Agreement are final and entered into by the parties in order to resolve the issues raised in ATU 1338's general grievance. Paragraph P specifically provides:

> This Resolution of the General Grievance filed April 24, 2001 constitutes a final resolution to the issues raised in the General Grievance. Furthermore, Amalgamated Transit Union, Local 1338 shall not file a General Grievance concerning terms and conditions of employment, specified wages, hours, and conditions of work for a period of three (3) years. Said term shall run from October 1, 2001 to September 30, 2004. DART agrees for the three (3) year period it will not make **any** unilateral changes to DART'S hourly employment manual except for those issues remaining open herein.

(emphasis added).

11. Paragraph S of the Resolution Agreement describes the "Management Rights" of DART and further illustrates that DART agreed to abide by the teems of the Resolution Agreement in order to resolve the underlying general grievance. Paragraph S(4) spe-
cifically provides:

> DART intends to abide by the provisions herein, and to resolve the general grievance as herein stated. By resolving this general grievance, DART does not intend to waive its legal obligations, including those set forth in its (13)(c) Arrangements and its position that it may not legally enter into a legally binding and bilateral agreement with a labor organization regarding

> wages, hours, or conditions of employment of public employees. This general grievance is therefore resolved subject to all the foregoing limitations.

(Emphasis added).

12. Despite DART's "position" that it may not enter into a legally binding and bilateral agreement with a labor organization regarding wages, hours, or conditions of employment with public employees, ATU 1338 never agreed to this "position" of DART. Furthermore, Texas law is definitively contrary to DART's position. In *Dallas Area Rapid Transit v. Plummer*, a lawsuit involving DART and a member of ATU 1338, the Dallas Court of Appeals held *inter alia* that employees, or their union, covered by a section 13(c) Urban Mass Transportation Act agreement, may bring a contract action in state court to enforce the agreement and that such agreements are binding on DART. *Dallas Area Rapid Transit v. Plummer*, 841 S.W.2d 870, 874 (Tex. App. — Dallas, 1992, writ denied).

13. The Resolution Agreement is a final resolution of a general grievance brought pursuant to Section 8.10 of the DART HEM and in conformity with DART's 13(c) Capital Arrangement certified by Department of Labor. Just as in *Plummer*, the Resolution Agreement is a binding contract upon which ATU 1338 may enforce through legal action in state court.

14. On or about September 23, 2003, the DART Board of Directors approved DART's 2003-2004 budget. In doing so, the Board did not provide for DART employees' 4% general pay increase for the year 2003-2004 as provided for in Paragraph B(3) of the Resolution Agreement. To date, DART has not

provided the 4% general pay increase agreed to in Paragraph B(3) of the Resolution Agreement.

15. DART has unilaterally changed its policy on the amount of life insurance available to employees. Previously, in accordance with the HEM, an employee was eligible for life insurance at two to three times the employee's annual salary level. DART has unilaterally decreased this benefit to allow employees to be eligible for life insurance at one time the employee's annual salary level. This unilateral policy change violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual. . ."

16. DART has unilaterally changed its policy on the amount of Service Incentive Pay (SIP) provided to employees. DART has frozen the level of SIP at 2002 pay rates instead of increasing SIP to 2003 level pay rates. The unilateral freezing of the SIP level violates the terms of the HEM and is a unilateral policy change that violates paragraph P of the Resolution Agreement which states that "DART agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual. . ."

17. DART has unilaterally instituted a new policy of not providing full benefits to new full time employees until after ninety days of employment, and is not allowing new full time employees to invest in a 401k plan until after six months of employment. Previously, when an employee was hired as a new full time employee, he/she would immediately receive full benefits and full 401k benefits. The unilateral change of this policy violates paragraph P of the Resolution Agreement which states that "DART

agrees that for the three year period it will not make any unilateral changes to DART's Hourly Employment Manual. . ."

18. On or about September 30, 2003, ATU 1338 President/Business Agent Kenneth Kirk sent a letter to DART Chairman of Board of Directors Robert Pope, and President/Executive Director Gary Thomas informing DART that ATU 1338 was asking DART to take all necessary action to implement the 4% general pay increase called for in Paragraph B(3) of the Resolution Agreement and that DART's failure to do so violated the Resolution Agreement.

19. The actions complained of herein directly affect and injure ATU 1338 and the members of the ATU 1338. The claims asserted herein are germane to ATU 1338's purpose and objective. Moreover, ATU 1338 is directly affected by the complained of acts through a reduction in its membership's salaries and wages, and a weakening of ATU 1338's negotiating strength on behalf of its members.

20. Plaintiff has retained the undersigned attorneys in order to prosecute this action.

21. Plaintiff hereby demands a trial by jury on all claims and defenses in this action.

V. FIRST CAUSE OF ACTION—*Breach of Contract*

22. Plaintiff realleges and incorporates the allegations contained in Paragraphs 1 through 21 as if fully contained herein.

23. Defendant breached the Resolution Agreement contract with Plaintiff when Defendant ceased to perform under the contract as stated *supra* when Defendant: (1) failed to implement the 4% general pay increase agreed to in Paragraph B(3) of the

contract, (2) unilaterally changed the life insurance policy, (3) unilaterally changed its SIP policy, and (4) unilaterally changed the policy for payment of benefits to new full time employees.

24. The Resolution Agreement contract between Defendant and Plaintiff was supported by adequate consideration. The parties mutually agreed to all relevant terms. All conditions precedent to Defendant's performance under the contract have been performed or have occurred. Performance by Defendant was not excused and DART agreed that for a three year period (running from October 1, 2001 to September 30, 2004), DART would abide by the terms of the resolution and not make any unilateral changes to DART's HEM.

25. Plaintiff has performed its obligations under the contract. In particular, prior to Defendant's breach of the contract, Plaintiff withheld from filing any general grievance concerning terms and conditions of employment, specified wages, hours, or conditions of work.

26. As a result of Defendant's breach of the contract, as set out in the preceding paragraphs of this petition, Plaintiff's members have sustained financial injury and lost the benefits expected under the contract. Furthermore, Defendant's complained of acts have harmed Plaintiff by not increasing its members' salaries and wages, and by weakening ATU 1338's negotiating strength on behalf of its members.

27. On September 30, 2003, Plaintiff notified Defendant that DART's actions were in violation of the Resolution Agreement. Defendant has refused to honor the Resolution Agreement by: (1) failing to implement the 4% general pay increase agreed to in Paragraph B(3) of the contract, (2) unilaterally

changing the life insurance policy, (3) unilaterally changing the SIP policy, and (4) unilaterally changing the policy for payment of benefits to new full time employees

28. Furthermore, ATU 1338 is entitled to recover its reasonable and necessary attorneys' fees because this is a claim, on an oral or written contract within the meaning of Civil Practice and Remedies Code §38.001.

29. ATU 1338 hereby demands trial by jury on all claims and defenses in this action.

VI. PRAYER

WHEREFORE, Plaintiff ATU 1338 requests that Defendant Dallas Area Rapid Transit (DART) be cited to appear and answer, and that after trial by jury, ATU 1338 have judgment against DART as follows:

1. Actual damages;
2. Pre-judgment interest in the maximum amount allowed by law;
3. Reasonable and necessary attorneys' fees;
4. Post-judgment interest in the maximum amount allowed by law;
5. Costs of suit;
6. An injunction ordering DART to retroactively implement the 4% general pay increase agreed to in Paragraph B(3) of the Resolution Agreement with retroactive application of the injunction to the first full pay period in October 2003;
7. An injunction ordering DART to restore the level of life insurance benefits previously

offered to DART employees by providing DART employees life insurance benefits at two to three times their annual salary level;

8. An injunction ordering DART to retroactively restore and pay SIP at increased levels in accordance with the HEM;

9. An injunction ordering DART to provide full benefits to all newly hired employees in accordance with the HEM and to retroactively provide full benefits upon any employee denied benefits during their first 90 days of employment with DART; and Such other and further relief to which Plaintiff may justly be entitled.

Respectfully submitted,

GITLESPIE, ROZEN, WATSKY, & MOTLEY, P.C.
3402 Oak Grove Avenue, Suite 200
Dallas, Texas 75204
Telephone.: (214) 720-2009
Telecopier: (214) 720-2291

Date: 11/12/04

By /s/ Hal K. Gillespie
HAL K. GILLESPIE (attorney-in-charge)
State Bar No. 07925500
JOSEPH H. GILLESPIE
State Bar No. 24036636

APPENDIX N

IN THE DISTRICT COURT
191ST JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

CAUSE NO. 04-06740-J

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendants.

PLAINTIFF'S SUPPLEMENTAL BRIEFING IN RESPONSE TO DEFENDANT'S PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Amalgamated Transit Union Local No. 1338 ("ATU 1338" or "Plaintiff"), and as requested by the Court during the November 16, 2004 hearing, files this its Supplemental Briefing in Response to Defendant Dallas Area Rapid Transit's ("DART" or "Defendant") Plea to the Jurisdiction and respectfully shows the following:

I. INTRODUCTION

During the November 16, 2004 hearing on Defendant's Plea to the Jurisdiction, the Court requested supplemental briefing from the parties regarding the impact the parties' Section 13(c) Protective Agreement has on this Court's jurisdiction, Specifically, the Court requested further briefing on the issue of whether or not the Supremacy Clause of the United States

Constitution would in any way preempt DART from being able to claim governmental immunity when ATU 1338 has brought suit in state court to enforce the parties' Section 13(c) Protective Agreement.[1] Further research establishes that, as argued by Plaintiff during the November hearing, the Supremacy Clause preempts DART's claims of governmental immunity because such immunity (1) presents an actual conflict with the Urban Mass Transportation Act of 1964 ("UMTA") 42 U.S.C. §5301 *et seq.* and (2) would obstruct Congress' purposes and objectives within the UMTA.

II. ARGUMENT AND AUTHORITIES

A. A Brief History of the Parties' 13(c) Agreement

As discussed at the November hearing, DART and ATU 1338 have a unique relationship as both are

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[1] Leave was also granted to provide limited further briefing on the *Satterfield* and *Reata Construction* cases and their impact on Plaintiffs argument that the statutory language of "sue and be sued" means just that, and that DART has no governmental immunity because of waiver under the Transportation Code. Plaintiff will not exhaustively brief this issue at this time because the law has not changed since the November hearing. Both *Satterfield* and *Reata Construction* are currently fully briefed and pending before the Texas Supreme Court. To date, there is not a Texas Supreme Court case which abrogates or limits the holding of *Missouri Pac. R.R. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970) which states that that statutory "sue and be sued" language unambiguously waives governmental immunity. *See e.g. Alamo Community College District v. Browning Construction Co.*, 131 S.W.3d 146 (Tex.App. — San Antonio, 2004); *United Water Service Inc. v. City of Houston*, 137 S.W.3d 747, (Tex.App. — Houston [15' Dist.], 2004). Because of the important nature of this lawsuit, and the high likelihood that the Supreme Court will rule in the near future, it may be prudent for this Court to postpone ruling on DART's plea to the jurisdiction until the outcome of *Satterfield* and *Reata* are known.

parties to what is called a Section 13(c) Agreement under the UMTA.[2] At the time the UMTA was drafted, Congress was aware that several financially suffering private mass transportation companies across the country were being purchased by local governments and those local governments needed assistance from the federal government. *Jackson Transit Authority v. Local Division 1285, A.T.U.*, 457 U.S. 15, 17 (1982). At the same time, Congress recognized that as those private companies were purchased by public entities, the existing collective bargaining rights of the mass transit employees were at risk because several states had anti-collective bargaining laws for public employees. *Id.* Congress recognized the importance of preserving and protecting the existing and future rights of those employees to continue collective bargaining in a way that would still allow the federal government to provide financial assistance to the local governments. *Id.* Due to this concern, and to prevent federal funds from being used to destroy collective bargaining, Congress included §13(c) in the Act. *Id.* Section 13(c) of the Act, now 42 U.S.C. 5333(b), requires a state or local government, here DART, to make arrangements to preserve transit workers' rights before that entity may receive federal financial assistance pursuant to §5307 *et seq.* of the Act. *Id.* at 15. Under this arrangement, DART receives millions of dollars in federal grants from the Federal Transit Authority (FTA) and must remain eligible for federal funding by submitting annual Certifications and Assurances[3] to

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[2] Section 13(c) of the UMTA has been re-codified in 49 U.S.C. §5333(b) but the agreements are still referred to as "Section 13(c) Agreements."

[3] True and Correct Copies of DART's 2000-2004 Annual Certifications and Assurances are attached as Exhibits 1-5 to the affidavit of Joseph H. Gillespie which is Exhibit A to this sup-

the FTA stating, *inter alia*, that DART acknowledges its compliance with 42 U.S.C. 5333(b). See Exhibit B, *Fed. Register*, Vol. 69, No.10 at 2458, #3 Private Mass Transportation Companies. The parties' 13(c) Agreement, previously introduced as an exhibit to DART's plea to the jurisdiction, is the parties' protective arrangement for purposes of §5333(b), without which, DART would not be eligible for federal funding under the UMTA.

B. The Supremacy Clause and Its Impact in this Lawsuit.

1. Preemption under the Supremacy Clause

Under the Supremacy Clause of the Unites States Constitution, if a state law conflicts with federal law, the state law is preempted and without affect. U.S. Constitution, Art. IV, c1.2 *Delta Air Lines, Inc., v. Black*, 116 S.W. 3d 745, 748 (Tex. 2003) citing to *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Texas law is clear that preemption can take many forms. A federal law may preempt a state law expressly. *Delta Air Lines*, at 748. Or, a federal law or regulation may preempt state law impliedly, either (1) when the scheme of federal regulation is sufficiently comprehensive to support a reasonable inference that Congress left no room for supplementary state regulation or (2) if the state law actually conflicts with federal regulations. *Id. citing to Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). A state law presents an actual conflict when a party cannot comply with both state and

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plemental briefing. A true and correct copy of the Federal Register's printing of Fiscal Year 2004's Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements is attached hereto as Exhibit B.

federal regulations or when the state law would obstruct Congress' purposes and objectives. *Id.* (emphasis added). A federal regulation has the same preemptive effect as a federal statute. *Foreness v. Hexamer*, 971 S.W.2d 525, 528 (Tex.App. — Dallas 1997). In determining Congress' intent, there is a presumption against preemption in order to insure that neither Congress nor the courts unnecessarily or unintentionally disturb the federal-state balance. *Marrs v. Ford Motor Company*, 852 S.W.2d 570, 574 (Tex.App. — Dallas, 1993). Because of this presumption against preemption, the critical question in any preemption analysis is to determine the intent of Congress. *Id.*

2. The Purposes and Objectives of the UMTA

This Court's analysis of Congress' intent in drafting the UMTA is made less burdensome in this case because the United States Supreme Court undertook this same analysis in *Jackson Transit Authority v. Local Division 1285, A.T.U.*, 457 U.S. 15, 17 (1982). As *Jackson Transit* holds, the Act was created by Congress with the intention of salvaging several privately owned mass transportation companies from dire financial straits by providing federal aid for local governments to acquire the failing private transit companies so that communities could continue to receive the benefits of mass transportation despite the collapse of private operations. *Id.*, citing to S.Rep.No. 82, 88th Cong., Sess., 4-5, 19-20 (1963). Furthermore, Congress knew that public ownership might threaten existing collective bargaining rights of unionized transit workers because several states had laws against collective bargaining for public employees. *Id.*, citing to Urban Mass Transportation-1963, Hearings on S.6 and S.917 before Subcommittee of the Senate

Committee on Banking and Currency, 88 II) Cong., 151 Sess., 318-232 (1963) (Senate Hearings) (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO). Based on this knowledge, Congress included Section 13(c) in the Act for the purpose of preventing federal funds from being used to destroy the collective bargaining rights of organized workers. *Id.* citing to H.R. Rep.No.204, 88th Cong., 151 Sess., 15-16 (1963). Indeed, the Supreme Court has interpreted the Act as setting forth mandatory requirements, not simply general objectives or suggestions, when it held that Section 13(c), "lists several protective steps that *must* be taken before a local government may receive federal aid; among these is the . . . continuation of collective bargaining rights." *Id.* at 17-18; *See also Amalgamated Transit Union International, AFL-CIO, v. Donovan*, 767 F.2d 939, 944 (D.C. Cir. 1985).

Jackson Transit Authority explains the fine balance reached between the traditional federal protection of collective bargaining found with the UMTA and the traditional state cause of action for breach of contract. *Jackson Transit Authority* at 23-24. On the one hand, the UMTA specifically and expressly incorporates the protective arrangements into the grant contract between the recipient and the Federal Government by specifying five different varieties of protection which *must* be included within the 13(c) agreement, and on the other hand, the Act does not establish an intent to disturb the traditional exemptions found for local governments in the National Labor Relations Act. *Id.* Summarizing its findings of the Congressional intent within the Act, the Court held:

> **Congress intended that §13(c) would be an important tool to protect workers, by ensur-**

> **ing that state law preserved their rights** before federal aid could be used to convert private companies into public entities. But Congress designed §13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.

Id. at 27-28(internal quotes omitted, emphasis added). Thus, Congress created a window under which states could maintain their previous standing bodies of labor law, but at the same time protected the collective bargaining rights of workers at mass transit entities that were to receive federal funds by conditioning the acceptance of those funds upon a grant of protective rights found within the § 13(c) agreement. However, if DART can claim immunity from suit under the laws of Texas, the protections of the §13(c) agreement are rendered meaningless and the balance created by Congress within the Act is lost.

In another Supreme Court case involving the UMTA, the Supreme Court held that the San Antonio Metropolitan Transit Authority (SAMTA), could not plead immunity to minimum wage and overtime pay provisions within the Fair Labor Standards Act because SAMTA was benefitting from millions of dollars of federal funds and the federal government's requirements were well within the bounds of Congress' power under the Commerce Clause. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 533, 557 (1985). Similarly here, DART is directly benefitting from federal assistance which is contingent upon DART'S certifications that it is upholding the parties' 13(c) Agreement. Unlike the plaintiffs in *Garcia v. SAMTA*, ATU 1338 cannot bring this lawsuit in federal court because they have been expressly

precluded from doing so by the Supreme Court in *Jackson Transit Authority. Jackson Transit Authority* at 29; *see also Amalgamated Transit Union v. American Transit Corporation*, 1989 WL 229379, 2-3 (W.D. Tex., Austin Div. April 26, 1989)(holding that a lawsuit complaining of a breach of a Section 13(c) Agreement cannot be brought in federal court); *see also DART v. Plummer*, 841 S.W.2d 870, 874 (Tex.App. — Dallas 1992). Failure to preempt in this case would therefore leave Plaintiff without a remedy because Plaintiff would no longer be able to bring this suit in state court and is already precluded from doing so in federal court.

3. DART's Catch-22 Argument of Immunity

DART leaves the Court with a Catch-22 argument of immunity. First, DART is subject to a federal regulatory scheme wherein DART *must* have a 13(c) agreement in place to receive millions of dollars in federal funds. Next, according to the Supreme Court, ATU 1338 can *only* bring suit against DART to enforce the 13(c) Agreement in state court. Then catch-22, if the 13(c) agreement is breached (as alleged in this suit), ATU 1338 cannot enforce in state court those rights provided by the federal government that allow DART to receive federal funding, because DART can plead governmental immunity in state court. If DART's argument is taken to its logical conclusion, DART and ATU 1338 have an illusory Section 13(c) Agreement because it cannot be enforced against DART and therefore DART should be ineligible for federal funds pursuant to 42 U.S.C. §§ 5307 and 5333(b). Taken a step further, DART's agents and attorneys are subject to federal fraud liability pursuant to a host of anti-fraud statutes (as referenced within the annual FTA Certifications and Assurances

signed by DART and its attorneys, attached hereto as Exhibits 1-5 to Exhibit A).[4]

DART's catch-22 argument that it can plead governmental immunity violates the Supremacy Clause by holding the laws of Texas above that of the Federal Government. The UMTA was specifically designed to protect the rights of the employees by requiring that DART and ATU 1338 have in place an enforceable 13(c) Agreement before DART can be eligible for federal funds. *Jackson Transit Authority* at 27-28. As it stands now, with DART claiming immunity to suit in state court, Texas's immunity laws are obstructing Congress' purposes and objectives by providing DART with federal financing while not protecting the rights of ATU 1338 and its members. DART's actions in claiming immunity under the laws of Texas also directly conflict with 42 U.S.C. §§5333(b) and 5307 *et seq.*, as well as the Federal Transit Authority's annual certifications and assurances which DART is required to (and has to date) signed before receiving any federal funds. The Supremacy Clause calls for the preemption of DART's alleged governmental immunity in order to uphold the purposes of the UMTA.

III. CONCLUSION

WHEREFORE, for the reasons discussed above, and within ATU 1338's Response to DART's Plea to the Jurisdiction, there are sufficient facts and arguments raised to establish that the Court has subject matter jurisdiction over this lawsuit and Plaintiff respectfully prays that the Court deny DART's Plea to the Jur-

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[4] While not waiving a claim of fraud, ATU 1338 is not accusing DART or its attorneys of fraud at this time and instead is merely indicating the ramifications of DART's governmental immunity argument if taken to its logical conclusion.

isdiction in its entirety and grant Plaintiff such further relief as the Court deems appropriate.

Respectfully submitted,

GILLESPIE, ROZEN, WATSKY, & MOTLEY, P.C.
3402 Oak Grove Avenue, Suite 200
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Telephone.: (214) 720-2009
Telecopier: (214) 720-2291

Date: 12/17/04

By: /s/ Hal K. Gillespie
HAL K. GILLESPIE (attorney-in-charge)
State Bar No. 07925500
Joseph H. Gillespie
State Bar No. 24036636

IN THE DISTRICT COURT
191st JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

CAUSE NO. 04-067404

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Plaintiff,

v.

DALLAS AREA RAPID TRANSIT,
Defendants.

AFFIDAVIT OF JOSEPH H. GILLESPIE

STATE OF TEXAS)
)
COUNTY OF DALLAS)

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared Joseph H. Gillespie and first being duly sworn according to law, upon his oath deposed and said:

I make the following declarations subject to the penalties for perjury:

1 My name is Joseph H. Gillespie and I am over 21 years of age and fully competent to make this affidavit. I have personal knowledge of the facts stated herein and they are all true and correct.

2. I am a licensed attorney and associate in the law firm of Gillespie, Rozen, Watsky, & Motley P.C. and am acting as legal counsel for the Amalgamated Transit Union Local No. 1338 ("ATU 1338") in this litigation.

3. Attached hereto as Exhibits 1-5 are true and correct copies of DART's 2000-2004 Annual Certifications and Assurances which I personally received from counsel for DART, Harold McKeever, as production to a discovery request in this case. I have also attached a true and correct copy of the cover letter from Mr. McKeever regarding the above documents. Further, Affiant saith not.

/s/ Joseph H. Gillespie
JOSEPH H. GILLESPIE

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority by the said Joseph H. Gillespie on this the 17th day of December, 2004, to certify which witness my hand and seal of office.

/s/ Dianna K. Richard
Notary Public, State of Texas

/s/ Dianna K. Richard
Printed Name of Notary

My commission expires: 12/29/06

FEDERAL FISCAL YEAR 2000 FTA CERTIFICATIONS AND ASSURANCES

(Required of all Applicants for FTA Assistance and all FTA Grantee's with an active capital or formula project)

Name of Applicant: Dallas Area Rapid Transit (DART)
Name and Relationship of Authorized Representative: Roger Snoble, President/Executive Director

BY SIGNING BELOW, I, Roger Snoble, on behalf of the Applicant, declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with al 1 Federal statutes, regulations, executive orders, and administrative guidance required for each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 2000.

FTA intends that the certifications and assurances the Applicant selects on the other side of this document, as representative of the certifications and assurances in Appendix A, should apply, as required, to each project for which the Applicant seeks now, or may later, seek FTA assistance during Federal Fiscal Year 2000,

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.*, as implemented by U.S. DOT regulations, "Program Fraud Civil Remedies," 49 alt. part 31 apply to any certification, assurance or submission made to FTA. The criminal fraud provisions of 18 U.S.C. 1001 apply to any certification, assurance, or submission made in

connection with the Urbanized Area Formula Program, 49 U.S.C. 5307, and may apply to any other certification, assurance, or submission made in connection with any program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statements made by me on behalf of the Applicant are true and correct.

Signature Roger Snoble Date: 12-28-99
Name ROGER SNOBLE
Authorized Representative of Applicant

AFFIRMATION OF APPLICANT'S ATTORNEY
for Dallas Area Rapid Transit (DART) Authority

As the undersigned legal counsel for the above named Applicant, I hereby affirm to the Applicant that it has authority under state and local law to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performance of the project. Furthermore, if I become aware of circumstances that change the accuracy of the foregoing statements, I will notify the Applicant promptly, which may so inform FTA.

Signature Roger Snoble Date: 12-28-99
Name ROGER SNOBLE
Authorized Representative of Applicant

Each Applicant for FTA financial assistance (except 49 U.S.C. 5312(b) assistance) and each FTA grantee with an active capital or formula project must provide an Attorney's affirmation of the Applicant's legal capacity. The Applicant may enter its PIN number in lieu of the electronic signature of its Attorney, provided the Applicant has on file this Affirmation of its Attorney in writing dated this Federal fiscal year.

Appendix A

FEDERAL FY 2000 CERTIFICATIONS AND ASSURANCES FOR FTA ASSISTANCE

Name of Applicant: Dallas Area Rapid Transit (DART)

The Applicant agrees to comply with applicable requirements of Categories I-XV. X (The Applicant may make this selection in lieu of individual selections below.)

OR

The Applicant agrees to comply with the applicable requirements of the following categories it has selected:

I. Certifications and Assurances Required of Each Applicant
II. Lobbying Certification
III. Effects on Private Mass Transportation Companies
IV. Public Hearing Certification for a Project with Substantial Impacts
V. Certification for the Purchase of Rolling Stock
VI. Bus Testing Certification
VII. Charter Service Agreement
VIII. School Transportation Agreement
IX. Certification for Demand Responsive Service

X. Substance Abuse Certifications
XI. Certification for Interest or other financing Costs
XII. Certifications for Urbanized Area Formula Program and the Job Access and Reverse Commute Program
XIII. Certifications for the Elderly and Persons with Disabilities Program
XIV. Certifications for the Nonurbanized Area Formula Program
XV. Certifications for the State Infrastructure Bank (SIB) Program

(Both sides of this Signature Page must be appropriately completed and signed where indicated.)

FEDERAL FISCAL YEAR 2001 FTA CERTIFICATIONS AND ASSURANCES

(Required of all Applicants for FTA Assistance and all FTA Grantee's with an active capital or formula project)

Name of Applicant: Dallas Area Rapid Transit (DART)
Name and Relationship of Authorized Representative: Roger Snoble, President/Executive Director

BY SIGNING BELOW I, Roger Snoble, on behalf of the Applicant, declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with all Federal statutes, regulations, executive orders, and administrative guidance required for each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 2001.

FTA intends that the certifications and assurances the Applicant selects on the other side of this document, as representative of the certifications and assurances in Appendix A, should apply, as required, to each project for which the Applicant seeks now, or may later, seek FTA assistance during Federal Fiscal Year 2001.

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.*, as implemented by U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR part 31 apply to any certification, assurance or submission made to FTA. The criminal fraud provisions of 18 U.S.C. 1001 apply to any certification, assurance, or submission made in

connection with the Urbanized Area Formula Program, 49 U.S.C. 5307, and may apply to any other certification, assurance, or submission made in connection with any program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statements made by me on behalf of the Applicant are true and correct.

Signature Roger Snoble Date: 2/28/01
Name ROGER SNOBLE
Authorized Representative of Applicant

AFFIRMATION OF APPLICANT'S ATTORNEY
for Dallas Area Rapid Transit (DART) Authority

As the undersigned legal counsel for the above named Applicant, I hereby affirm to the Applicant that it has authority under state and local law to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performance of the project.

Signature Roland Castaneda Date: 2/16/01
Name ROLAND CASTANEDA
Authorized Representative of Applicant

Each Applicant for FTA financial assistance (except 49 U.S.C. 5312(b) assistance) and each FTA grantee with an active capital or formula project must provide an

Attorney's affirmation of the Applicant's legal capacity. The Applicant may enter its PIN number in lieu of the electronic signature of its Attorney, provided the Applicant has on file this Affirmation of its Attorney in writing dated this Federal fiscal year.

Appendix A

FEDERAL FY 2001 CERTIFICATIONS AND ASSURANCES FOR ETA ASSISTANCE

Name of Applicant: Dallas Area Rapid Transit (DART)

The Applicant agrees to comply with applicable requirements of Categories 1-15. X (The Applicant may make this selection in lieu of individual selections below.)

OR

The Applicant agrees to comply with the applicable requirements of the following categories it has selected:

1. Certifications and Assurances Required of Each Applicant
2. Lobbying Certification
3. Certification Pertaining to Effects on Private Mass Transportation Companies
4. Public Hearing Certification for a Project with Substantial Impacts
5. Certification for the Purchase of Rolling Stock
6. Bus Testing Certification
7. Charter Service Agreement
8. School Transportation Agreement
9. Certification for Demand Responsive Service
10. Substance Abuse Certifications
11. Certification for a Project Involving Financing Costs

12. Certifications for Urbanized Area Formula Program, the Job Access and Reverse Commute Program, and the Clean Fuels Formula Program
13. Certifications for the Elderly and Persons with Disabilities Program
14. Certifications for the Nonurbanized Area Formula Program
15. Certifications for the State Infrastructure Bank (SIB) Program

(Both sides of this Signature Page must be appropriately completed and signed where indicated.)

FEDERAL FISCAL YEAR 2002 FTA CERTIFICATIONS AND ASSURANCES

(Required of all Applicants for FTA Assistance and all FTA Grantee's with an active capital or formula project)

Name of Applicant: Dallas Area Rapid Transit (DART)

Name and Relationship of Authorized Representative: Gary C. Thomas, President/Executive Director

BY SIGNING BELOW I, Gary C. Thomas, on behalf of the Applicant, declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with al 1 Federal statutes, regulations, executive orders, and administrative guidance required for each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 2002.

FTA intends that the certifications and assurances the Applicant selects on the other side of this document, as representative of the certifications and assurances in Appendix A, should apply, as required, to each project for which the Applicant seeks now, or may later, seek FTA assistance during Federal Fiscal Year 2002.

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, 31. U.S.C. 3801 et as implemented by U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR part 31 apply to any certification, assurance or submission made to FTA. The criminal fraud provisions of 18 U.S.C. 1001 apply to any cer-

tification, assurance, or submission made in connection with the Urbanized Area Formula Program, 49 U.S.C. 5307, and may apply to any other certification, assurance, or submission made in connection with any program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statements made by me on behalf of the Applicant are true and correct.

Signature Gary C. Thomas Date: 1/31/02
Name GARY C. THOMAS
Authorized Representative of Applicant

AFFIRMATION OF APPLICANT'S ATTORNEY
for Dallas Area Rapid Transit (DART) Authority

As the undersigned Attorney for the above named Applicant, I hereby affirm to the Applicant that it has authority under state and local law to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performance o e project.

Signature: Roland Castaneda Date: 1/25/02
Name: Roland Castaneda
Applicant's Attorney

Each Applicant for FTA financial assistance (except 49 U.S.C. 5312(b) assistance) and each FTA grantee with an active capital or formula project must provide an

Attorney's affirmation of the Applicant's legal capacity. The Applicant may enter its PIN number in lieu of the electronic signature of its Attorney, provided the Applicant has on file this Affirmation of its Attorney in writing dated this Federal fiscal year.

Appendix A

FEDERAL FY 2002 CERTIFICATIONS AND ASSURANCES FOR FTA ASSISTANCE

Name of Applicant: Dallas Area Rapid Transit (DART)

The Applicant agrees to comply with applicable requirements of Categories 1-16. X (The Applicant may make this selection in lieu of individual selections below.)

OR

The Applicant agrees to comply with the applicable requirements of the following categories it has selected:

1. Certifications and Assurances Required of Each Applicant
2. Lobbying Certification
3. Certification Pertaining to Effects on. Private Mass Transportation Companies
4. Public Hearing Certification for a Project with Substantial Impacts
5. Certification for the Purchase of Rolling Stock
6. Bus Testing Certification
7. Charter Service Agreement
8. School Transportation Agreement
9. Certification for Demand Responsive Service
10. Prevention of Alcohol Misuse and Prohibited Drug Use Certification
11. Certification Required for Interest and Other Financing Costs

12. Intelligent Transportation Systems Program Assurance
13. Certifications and Assurances for the Urbanized Area Formula Program, the Job Access and Reverse Commute Program, and the Clean Fuels Formula Program
14. Certifications and Assurances for the Elderly and Persons with Disabilities Program
15. Certifications and Assurances for the Nonurbanized Area Formula Program
16. Certifications and Assurances for the State Infrastructure Bank (SIB) Program

(Both sides of this Signature Page must be appropriately completed and signed where indicated)

FEDERAL FISCAL YEAR 2003 FTA CERTIFICATIONS AND ASSURANCES

AFFIRMATION OF APPLICANT

Name of Applicant: Dallas Area Rapid Transit (DART) Authority

Name and Relationship of Authorized Representative: Gary C. Thomas, President/Executive Director

BY SIGNING BELOW on behalf of the Applicant, I declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with all Federal statutes, regulations, executive orders, and Federal requirements applicable to each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 2003.

FTA intends that the certifications and assurances the Applicant selects on the other side of this document, as representative of the certifications and assurances in Appendix A, should apply, as required, to each project for which the Applicant seeks now, or may later, seek FTA assistance during Federal Fiscal Year 2003.

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.*, as implemented by U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR part 31 apply to any certification, assurance or submission made to FTA. The criminal fraud provisions of 18 U.S.C. 1001 apply to any certification, assurance, or submission made in connection with the Urbanized Area Formula Pro-

gram, 49 U.S.C. 5307, and may apply to any other certification, assurance, or submission made in connection with any other program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statement made by me on behalf of the Applicant are true and correct.

Signature Gary C. THOMAS DATE: 11/20/02
GARY C. Thomas

AFFIRMATION OF APPLICANT'S ATTORNEY

For: Dallas Area Rapid Transit (DART) Authority

As the undersigned Attorney for the above named Applicant, I hereby affirm to the Applicant that it has authority under state and local law to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performance of the project.

Signature Roland Castaneda Date: 11-14-02
Name ROLAND CASTANEDA, General Counsel
Attorney for Applicant

Each Applicant for FTA financial assistance (except 49 U.S.C. 5312(b) assistance) and each FTA Grantee with an active capital or formula project must provide an Affirmation of Applicant's Attorney pertaining to the Applicant's legal capacity. The Applicant may enter its signature in lieu of the Attorney's signature, provided the Applicant has on file this Affirmation, signed by the attorney and dated this Federal fiscal year.

Appendix A

FEDERAL FY 2003 CERTIFICATIONS AND ASSURANCES FOR FTA ASSISTANCE

Name of Applicant: Dallas Area Rapid Transit (DART)

The Applicant agrees to comply with applicable requirements of Categories 1-16. X (The Applicant may make this selection in lieu of individual selections below.)

OR

The Applicant agrees to comply with the applicable requirements of the following categories it has selected:

1. Required of Each Applicant
2. Lobbying
3. Private Mass Transportation Companies
4. Public Hearing
5. Acquisition of Rolling Stock
6. Bus Testing
7. Charter Service Agreement
8. School Transportation Agreement
9. Demand Responsive Service
10. Alcohol Misuse and Prohibited Drug Use Certification
11. Interest and Other Financing Costs
12. Intelligent Transportation Systems Program
13. Urbanized Area, JARC, and the Clean Fuels Program
14. Elderly and Persons with Disabilities Program
15. Nonurbanized Area Formula Program
16. State Infrastructure Bank (SIB) Program

(Both sides of this Signature Page must be appropriately completed and signed where indicated.)

FEDERAL FISCAL YEAR 2004 FTA CERTIFICATIONS AND ASSURANCES

AFFIRMATION OF APPLICANT

Name of Applicant: Dallas Area Rapid Transit (DART) Authority

Name and Relationship of Authorized Representative: Gary C. Thomas, President/Executive Director

BY SIGNING BELOW on behalf of the Applicant, I declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with all Federal statutes, regulations, executive orders, and Federal requirements applicable to each application it makes to the Federal Transit Administration (FTA) in Federal Fiscal Year 2004.

FTA intends that the certifications and assurances the Applicant selects on the other side of this document, as representative of the certifications and assurances in Appendix A, should apply, as required, to each project for which the Applicant seeks now, or may later, seek FTA assistance during Federal Fiscal Year 2004.

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.*, as implemented by U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR part 31 apply to any certification, assurance or submission made to FTA. The criminal fraud provisions of 18 U.S.C. 1001 apply to any certification, assurance, or submission made in connection with the Urbanized Area Formula Pro-

gram, 49 U.S.C. 5307, and may apply to any other certification, assurance, or submission made in connection with any other program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statements made by me on behalf of the Applicant are true and correct.

Signature Gary C. Thomas Date: 4/12/04
GARY C. THOMAS

AFFIRMATION OF APPLICANT'S ATTORNEY

For: Dallas Area Rapid Transit (DART) Authority

As the undersigned Attorney for the above named Applicant, I hereby affirm to the Applicant that it has authority under state and local law to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performances of the project.

Signature Swanson W. Angle Date: April 7, 2004
Name SWANSON W. ANGLE
Attorney for Applicant

Each Applicant for FTA financial assistance (except 49 U.S.C. 5312(b) assistance) and each FTA Grantee with an active capital or formula project must provide an Affirmation of Applicant's Attorney pertaining to the Applicant's legal capacity. The Applicant may enter its signature in lieu of the Attorney's signature, provided

the Applicant has on file this Affirmation, signed by the attorney and dated this Federal fiscal year.

Appendix A

FEDERAL FY 2004 CERTIFICATIONS AND ASSURANCES FOR FTA ASSISTANCE

Name of Applicant: Dallas Area Rapid Transit (DART)

The Applicant agrees to comply with applicable requirements of Categories 1-16. X (The Applicant may make this selection in lieu of individual selections below.)

OR

The Applicant agrees to comply with the applicable requirements of the following categories it has selected:

1. Required of Each Applicant
2. Lobbying
3. Private Mass Transportation Companies
4. Public Hearing
5. Acquisition of Rolling Stock
6. Bus Testing
7. Charter Service Agreement
8. School Transportation Agreement
9. Demand Responsive Service
10. Alcohol Misuse and Prohibited Drug Use Certification
11. Interest and Other Financing Costs
12. Intelligent Transportation Programs
13. Urbanized Area, JARC, and Clean Fuels Programs
14. Elderly and Persons with Disabilities Program
15. Nonurbanized Area Formula Program
16. State Infrastructure Bank (SIB) Program

(Both sides of this Signature Page must be appropriately completed and signed where indicated.

APPENDIX O

DEPARTMENT OF TRANSPORTATION
Federal Transit Administration

FEDERAL REGISTER
Vol. 69, No. 10
Thursday, January 15, 2004

Fiscal Year 2004 Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements

AGENCY: Federal Transit Administration DOT.

ACTION: Notice.

SUMMARY: Appendix A of this Notice contains the Federal Transit Administration's (FTA) comprehensive compilation of the Federal Fiscal Year 2004 certifications and assurances to be used in connection with all Federal assistance programs FTA administers during Federal Fiscal Year 2004, in compliance with 49 U.S.C. 5323(n).

* * * *

SUPPLEMENTARY INFORMATION: Before FTA may award a Federal grant or cooperative agreement, the Applicant must submit all certifications and assurances pertaining to itself and its project as required by Federal laws and regulations. These certifications and assurances must be submitted to FTA irrespective of whether the project is financed under the authority of 49 U.S.C. chapter 53, or Title 23, United States Code, or another Federal statute.

The Applicant's Annual Certification and Assurances for Federal Fiscal Year 2004 cover all projects for which the Applicant seeks funding during Federal Fiscal Year 2004 through the next fiscal year until

FTA issues annual Certifications and Assurances for Federal Fiscal Year 2005. An Applicant's Annual Certifications and Assurances applicable to a specific grant or cooperative agreement generally remain in effect for either the duration of the grant or cooperative agreement to project closeout or the duration of the project or project property when a useful life or industry standard is in effect, whichever occurs later; EXCEPT if the Applicant provides certifications and assurances in a later year that differ from certifications and assurances previously provided, the later certifications and assurances will apply to the grant, cooperative agreement, project, or project property, unless FTA permits otherwise.

* * * *

1. Required of Each Applicant

Each Applicant for FTA assistance must provide all certifications and assurances in this Category "01." FTA may not award any Federal assistance until the Applicant provides these certifications and assurances by selecting Category "01."

A. Authority of Applicant and Its Representative

The authorized representative of the Applicant and the attorney who sign these certifications, assurances, and agreements affirm that both the Applicant and its authorized representative have adequate authority under applicable state and local law and the Applicant's by-laws or internal rules to:

(1) Execute and file the application for Federal assistance on behalf of the Applicant

(2) Execute and file the required certifications, assurances, and agreements on behalf of the Applicant binding the Applicant; and

(3) Execute grant agreements and cooperative agreements with FTA on behalf of the Applicant.

B. Standard Assurances

The Applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal requirements in carrying out any project supported by an FTA grant or cooperative agreement. The Applicant agrees that it is under a continuing obligation to comply with the terms and conditions of the grant agreement or cooperative agreement issued for its project with FTA. The Applicant recognizes that Federal laws, regulations, policies, and administrative practices may be modified from time to time and those modifications may affect project implementation. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise.

* * * *

3. A State or local government Applicant seeking Federal assistance authorized by 49 U.S.C. chapter 53 to acquire the property or an interest in the property of a private mass transportation company or to operate mass transportation equipment or facilities in competition with, or in addition to, transportation service provided by an existing mass transportation company must provide the following certification. FTA may not award Federal assistance for that type of project until the Applicant provides this certification by selecting Category "03."

As required by 49 U.S.C. 5323(a)(1), the Applicant certifies that before it acquires the property or an interest in the property of a private mass transportation company or operates mass transportation equip-

ment or facilities in competition with, or in addition to, transportation service provided by an existing mass transportation company, it has or will have:

A. Found that the assistance is essential to carrying out a program of projects as determined by the plans and programs of the metropolitan planning organization;

B. Provided for the participation of private mass transportation companies to the maximum extent feasible consistent with applicable FTA requirements and policies;

C. Paid just compensation under state or local law to a private mass transportation company for its franchises or property acquired; and

D. Acknowledged that the assistance falls within the labor standards compliance requirements of 49 U.S.C. 5333(a) and 5333(b).

* * * *

128 (2)

No. 08-1173

IN THE

Supreme Court of the United States

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Petitioner,

v.

DALLAS AREA RAPID TRANSIT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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* Counsel of Record

Counsel for Respondent Dallas Area Rapid Transit

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

This Court held in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC* that federal law does not create a cause of action "for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions." 457 U.S. 15, 29 (1982). Any such action must be filed under state law.

Properly considered, therefore, the Petition for a Writ of Certiorari asks this Court to consider the following question:

> Whether the Supreme Court of Texas properly held that federal law, by implication, does not preempt a state governmental entity's immunity from suit by a private party in state court and therefore does not confer jurisdiction upon state courts over such actions.

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IN THE

Supreme Court of the United States

No. 08-1173

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
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v.

DALLAS AREA RAPID TRANSIT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

Petitioner mischaracterizes the basic question presented by this case. The crucial question is not only whether Congress preempted, by implication, a state governmental entity's immunity from suit in enacting Section 13(c) of the Urban Mass Transit Act of 1964, as amended ("UMTA" or the "Act"),[1] but also, whether Congress can compel state courts to entertain state law claims over which the state courts have no jurisdiction as a matter of state law.

[1] UMTA is now known as the Federal Public Transportation Act, as amended. Section 13(c) of UMTA is codified at 49 U.S.C. § 5333(b).

The answer to this question can be found easily in Dallas Area Rapid Transit's ("DART") governmental immunity, as afforded by Texas state law, this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982) ("*Jackson Transit*"), and Congress' powers under the Constitution. As such, this case does not warrant a writ of certiorari.

The Supreme Court of Texas rightfully reversed the decision of the Court of Appeals for the Fifth District of Texas on the grounds that Section 13(c) of UMTA did not preempt, by implication, DART's immunity from suit under state law. This Court should let that decision stand.

I. Certiorari is not appropriate here because Petitioner's arguments are without merit. Neither the holding in *Jackson Transit*, this Court's constitutional precedent, nor Congress' constitutional authority permit Congress to override the immunity of governmental entities in state courts, by implication or otherwise.

Certiorari is not appropriate in this case because Petitioner's arguments lack merit. In light of the immunity granted to governmental entities under Texas state law, the holding of *Jackson Transit*, this Court's constitutional precedent, and the reach of Congress' constitutional authority, Petitioner's arguments do not diminish the correctness of the Texas Supreme Court's decision in the case below.

A. Texas state courts lack jurisdiction over DART as a political subdivision of the state of Texas and a governmental entity performing only governmental functions.

It is a fundamental rule of Texas jurisprudence that governmental immunity bars suits against governmental entities unless the Texas legislature has expressly waived that immunity by statute. *See Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994). Governmental immunity has been the rule of law in Texas since before the Republic of Texas became the 28th state, *see Hosner v. DeYoung*, 1 Tex. 764 (1847); *Bd. of Land Comm'rs v. Walling*, Dallam 524 (Tex. 1843) (Republic of Texas), and the Texas legislature and Texas courts have adhered to the rule of governmental immunity for more than 150 years. Under Texas law, governmental immunity from suit "raises a jurisdictional bar" and "defeats a trial court's subject matter jurisdiction." *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999); *see Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Chambers v. State*, 261 S.W.3d 755, 757 (Tex. App. – Dallas 2008, pet. denied).

The Texas legislature codified the rule of governmental immunity in Section 311.034 of the Texas Government Code.[2] Section 311.034 preserves as

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[2] Section 311.034 provides:

> In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language. In a statute, the use of "person," as de-

the Texas legislature's "sole province" the ability to waive or abrogate governmental immunity, and Texas courts have "consistently deferred" to the Texas legislature to waive immunity from suit. *IT-Davy*, 74 S.W.3d at 854. The Texas legislature's reservation of control over state governmental immunity reflects the legislature's desire to "manag[e] state fiscal matters through the appropriations process," TEX. GOV'T CODE ANN. § 311.034 (Vernon 2007), and Texas courts have agreed that the legislature is "better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear," *IT-Davy*, 74 S.W.3d at 854 (internal citations omitted).

In Texas, all agencies, political subdivisions, and other institutions derived from the Texas Constitution or the laws of the State of Texas enjoy governmental immunity. *Fowler v. Tyler Indep. Sch. Dist.*, 232 S.W.3d 335, 338 (Tex. App. – Tyler 2007, pet. denied); *see also Cranford v. City of Pasadena*, 917 S.W.2d 484, 487 (Tex. App. – Houston [14th Dist.] 1996, no writ).

DART is a Texas regional transportation authority authorized by and existing pursuant to Chapter 452 of the Texas Transportation Code. DART is a political subdivision of the State of Texas. *Stephens v. Dallas*

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fined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction. Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

TEX. GOV'T CODE ANN. § 311.034 (Vernon 2007).

Area Rapid Transit, 50 S.W.3d 621, 632-33 (Tex. App. – Dallas 2001, pet. denied). DART can perform only governmental functions, *see* TEX. TRANSP. CODE ANN. § 452.052 (Vernon 2007), and as a governmental entity performing only governmental functions, is entitled to governmental immunity, *see Port of Houston Auth. v. Guillory*, 814 S.W.2d 119, 122 (Tex. App. – Houston [1st Dist.] 1991), *aff'd*, 845 S.W.2d 812 (Tex. 1993). DART receives funding from several sources, including grants, bond revenues, passenger fares, and local sales and use tax revenues. *See* TEX. TRANSP. CODE ANN. §§ 452.055, 452.061, 452.352, & 452.401 (Vernon 2007). Therefore, DART, as a political subdivision of the State of Texas and a governmental entity performing only governmental functions, is entitled to assert governmental immunity from suit unless the Texas legislature has clearly and unambiguously waived DART's immunity.[3] DART's governmental immunity divests the Texas state courts of subject-matter jurisdiction over suits initiated against DART based on Texas state law.[4]

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[3] DART enjoys governmental immunity from suits on state law claims in Texas state courts, *see Tex. Ass'n of Sch. Bds. Risk Mgmt. Fund v. Benavides Indep. Sch. Dist.*, 221 S.W.3d 732, 734 (Tex. App. – San Antonio 2007, no pet.) ("Sovereign immunity protects the State from lawsuits for money damages . . . Unless expressly waived, its political subdivisions are also entitled to such immunity, referred to as governmental immunity.") (internal citations omitted), even though DART cannot claim Eleventh Amendment immunity from suits on federal law claims, *see Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 319 (5th Cir. 2001) (finding that DART is not an "arm of the state" for purposes of Eleventh Amendment immunity).

[4] In Texas, immunity from suit defeats a trial court's subject-matter jurisdiction, *Whitley*, 104 S.W.3d at 542 & 544, and is

B. Congress cannot compel state courts to entertain state law claims over which the state courts would have no jurisdiction as a matter of state law.

1. Congress has the authority to create federal causes of action and federal remedies cognizable in both federal and state courts and prescribe the reaches of federal court jurisdiction within the confines of Article III.

Congress has the power to create federal causes of action and provide remedies for violations of federal law, so long as Congress' exercise of creative authority comports with its delegated powers under the Constitution. *See Griffin v. Breckenridge*, 403 U.S. 88, 95 (1971); *cf. United States v. Morrison*, 529 U.S. 598, 613 (2000) (Congress could not provide a federal remedy for gender-motivated crime pursuant to its power to regulate interstate commerce). And under the Supremacy Clause, state courts must respect and enforce validly created federal causes of action in cases properly before them. *See* U.S. CONST. art. VI; *Testa v. Katt*, 330 U.S. 386, 394 (1947) (state courts may not refuse to hear a federal claim if "th[e] same type of claim arising under [state] law would be enforced by that State's courts").

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properly asserted in a plea to the jurisdiction, *Tex. Dep't of Transp.*, 8 S.W.3d at 638-39. Here, DART filed a plea to the jurisdiction, which the District Court, 191st Judicial District, Dallas County, Texas, denied. DART appealed the District Court's denial of the plea to the jurisdiction to the Court of Appeals for the Fifth District of Texas, and then appealed the Court of Appeals' affirmance of the District Court's denial to the Texas Supreme Court.

Congress also has the constitutional authority to prescribe the reaches of federal court jurisdiction within the confines of Article III. *See* U.S. CONST. art. I, § 8; *id.* art. III, § 1. Congress' power to define federal court jurisdiction, and in particular circumstances, grant exclusive federal court jurisdiction for federal claims, does not lessen the authority of the States to define the jurisdiction of their own courts. As is evident from the "dual sovereignty" structure of our government, the Framers did not alienate the power of state courts by creating the federal government or the federal judiciary. *See* THE FEDERALIST No. 82, at 450-51 (A. Hamilton), in ALEXANDER HAMILTON, JOHN JAY, JAMES MADISON, ET AL., THE FEDERALIST & OTHER CONSTITUTIONAL PAPERS (E. H. Scott ed., 1898):

> The only thing in the proposed Constitution, which wears the appearance of confining the causes of Federal cognizance, to the Federal courts, is contained in this passage: "The *judicial power* of the United States *shall be vested* in one supreme court, and in *such* inferior courts as the Congress shall from time to time ordain and establish." This might either be construed to signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes, to which their authority is to extend: or simply to denote, that the organs of the National Judiciary should be one supreme court, and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the

> concurrent jurisdiction of the State tribunals: and as the first would amount to an alienation of State power by implication, the last appears to me the most defensible construction.

Rather, state courts retain the jurisdiction they enjoyed prior to the ratification of the Constitution and can exercise concurrent jurisdiction with the federal courts over federal claims, except where Congress determines that federal jurisdiction should be exclusive. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990); *Bowles v. Willingham*, 321 U.S. 503, 511-12 (1944); *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867) (Congress has power to create exclusive federal jurisdiction).

2. Congress' powers do not authorize Congress to expand state court subject-matter jurisdiction for purely state law causes of action.

State law, not federal law, governs the subject-matter jurisdiction of state courts. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). In appropriate circumstances, Congress may *divest* the state courts of subject-matter jurisdiction to hear federal claims. But in most cases, the Framers intended that Congress not be able to unduly intrude upon the general jurisdiction of state courts. *Glidden Co. v. Zdanok*, 370 U.S. 530, 581 (1962) ("those limitations implicit in the rubric 'case or controversy' . . . spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts") (internal citation omitted); *see Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 790 (1991) (Blackmun, J., dissenting) ("federal intrusion into state authority is the unusual case").

Congress' lack of authority over state court jurisdiction is evident in light of this Court's decisions in the area of concurrent federal-state jurisdiction over federal claims. This Court has established that state courts may not deny enforcement of federal claims if the state courts have "jurisdiction adequate and appropriate under established local law" to adjudicate the federal claims. *Testa*, 330 U.S. at 394. However, the States have no obligation to create courts "competent" to hear federal claims to fulfill their duty to enforce federal law as the supreme law of the land. *See Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented."). If Congress cannot require the state courts to enforce federal claims if the state courts do not have "jurisdiction adequate and appropriate" under state law to hear such claims, Congress certainly cannot require state courts to enforce purely state law claims if the state courts do not have subject-matter jurisdiction under state law to hear those claims.

Here, Petitioner is asking this Court to consider an argument that would require the Court to hold that Congress can enlarge the subject-matter jurisdiction of the Texas state courts by implied intent. Just as the Framers would not have wanted to strip the state courts of the jurisdiction they enjoyed before the ratification of the Constitution, the Framers would not support a federal imposition of subject-matter jurisdiction on state courts for state law claims, where the federally imposed jurisdiction would be inimical to the state courts' jurisdiction as defined by state law.

C. Congress has ample means at its disposal to ensure compliance with federal law, including creating federal causes of action and conditioning the receipt of federal monies on concessions from the States, but chose not to employ those options to ensure compliance with Section 13(c) of the Act.

Congress has ample means at its disposal to ensure compliance with federal law and safeguard against potential negative effects of new legislation. Among other things, Congress may provide federal causes of action to remedy conduct that it seeks to deter in legislation, and in the context of bills appropriating federal funds, Congress may condition the receipt of the funds on the recipient's agreeing to take actions that Congress otherwise could not require the recipient to take, *see Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (Congress may "in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take").

In enacting UMTA, Congress was concerned that the de-privatization of transportation systems would adversely affect the collective-bargaining rights of transit workers. *See Jackson Transit*, 457 U.S. at 17 (Congress included Section 13(c) in an attempt to "prevent federal funds from being used to destroy the collective-bargaining rights of organized workers") (citing H.R. Rep. No. 204, 88th Cong., 1st Sess., 15-16 (1963)). To guard against that result, Congress conditioned the receipt of UMTA monies on the recipient's compliance with Section 13(c) of the Act. Section 13(c) requires that the recipient make "fair and equitable"

arrangements (hereinafter referred to as "Section 13(c) arrangements"), certified as such by the Secretary of Labor, to protect the "interests of employees affected by the assistance." 49 U.S.C. § 5333(b)(1).

1. Congress could have, but did not, create a federal cause of action for Section 13(c) violations.

Congress may create federal causes of action as remedies for conduct that Congress seeks to deter in legislation. In UMTA, Congress did not create a federal cause of action "for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions." *Jackson Transit*, 457 U.S. at 29. Instead, Congress chose to rely on state law and the state courts to govern the labor relations between parties to Section 13(c) arrangements. *Id.* at 24 ("Congress intended that labor relations between transit workers and local governments would be controlled by state law.").

When Congress chooses to rely on state law to provide remedies for aggrieved parties and does not provide a federal forum for the resolution of disputes, it must take the state law, the state courts, and the subject-matter jurisdiction of the state courts as it finds them. *See Howlett*, 496 U.S. at 372 ("The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'") (internal citations omitted). If Congress could not tolerate the possibility that state law would deny transit employees the option of suing local governments in state courts on state law claims, Congress had "ample power" under Articles I and III of the Constitution to "enact a suitable solution." *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S.

249, 260 n.17 (1977) (quoting *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 216 (1971)). Congress could have provided a federal remedy and a federal forum for aggrieved parties to Section 13(c) arrangements. Congress did not do so.

2. Congress could have, but did not, condition the receipt of UMTA funds on the state entity's waiver of its right to assert immunity from suit in actions involving Section 13(c) in state court.

Incidental to its powers under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, Congress "may attach conditions on the receipt of federal funds" to "further [its] broad policy objectives" for particular legislation.[5] *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal citations omitted). Because legislation enacted under the Spending Clause is "much in the nature of a contract" between Congress and the States, the "legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (internal citations omitted). Congress must "unambiguously" set out the conditions that it intends to attach to a State's acceptance of federal funds because "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington*

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[5] The "mere receipt of federal funds cannot establish that a State has consented to suit." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (internal citations omitted), *not followed on other grounds by Alden v. Maine*, 527 U.S. 706 (1999).

Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (internal citations omitted).

If Congress so desired, it could have conditioned the receipt of UMTA monies on the state entity's waiver of immunity and guarantee of a state court forum for the resolution of disputes between parties to Section 13(c) arrangements.[6] It did not do so. Instead, Congress chose to condition the receipt of UMTA funds on the state entity entering into an approved agreement to preserve the transit workers' collective-bargaining rights. Section 13(c) only requires that the state entity make "fair and equitable" arrangements to protect the "interests of employees affected by the assistance." 49 U.S.C. § 5333(b)(1). Nothing in Section 13(c) ambiguously or unambiguously conditions the receipt of UMTA monies on the state entity's consent to suit by transit workers or their representative unions in either state or federal court, and neither Petitioner nor this Court can imply Congress' intent to impose such a condition on the receipt of UMTA funds.

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[6] Congress does not have unlimited power to impose conditions on the receipt of federal funds. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. at 211 ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'") (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). We take no position on whether the imposition of a condition in Section 13(c) requiring that the States waive state governmental immunity for suits in state courts involving Section 13(c) claims would be appropriate under or within the limits of Congress' Spending Clause power.

3. Congress did not express an intent to abrogate state governmental immunity in Section 13(c), and as with congressional abrogation of Eleventh Amendment immunity, a congressional intent to abrogate state governmental immunity for purely state law claims should not be implied.

In the context of the sovereign immunity of a State itself under the Eleventh Amendment, Congress must clearly express its intent to abrogate that immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) ("Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'") (citing *Blatchford*, 501 U.S. at 786); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (clear statement is required to compel States to entertain damages suits against themselves in state courts). Even outside the specific confines of the Eleventh Amendment of the Constitution, Congress should not be held to a lesser standard of clarity of intent when seeking to subject state entities to suits. Sovereign immunity is an important constitutional principle that has at its foundation the right of the people to control, through their elected representatives, the power to tax and spend their money. Under our dual system of sovereignty, *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (U.S. 2009) (Thomas, J., concurring); *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002), that principle cannot, and should not, be eroded by implication.

UMTA, and Section 13(c) in particular, contain no expression of congressional intent to override state

laws giving immunity to state governmental entities. *See generally* Urban Mass Transit Act of 1964, as amended, 49 U.S.C. §§ 5301-5330, 5332-5338. The Act contains no reference to the Eleventh Amendment, sovereign immunity, governmental immunity, or suits in state courts.[7] The absence of any abrogation language in UMTA and in Section 13(c) of UMTA is conclusive evidence that Congress did not intend to abrogate state laws giving immunity to state governmental entities through UMTA.

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[7] Congress knows how to express its intent to abrogate sovereign immunity in federal statutes, *see, e.g.*, 15 U.S.C. § 1122(b) (States "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person ... for any violation under this chapter."); 25 U.S.C. § 2710(d)(7)(A)(i) (vesting jurisdiction in federal courts over "any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith"); 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of the requirements of this chapter. . ."), and previous decisions of this Court recognize Congress' knowledge and fulfillment of its burden to clearly express its intent to abrogate, *see, e.g., United States v. Georgia*, 546 U.S. 151, 154 (2006) (Americans with Disabilities Act contains an "unequivocal expression of [Congress'] intent to abrogate state sovereign immunity"); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (finding that Congress' expression of its intent to abrogate the States' sovereign immunity in the Americans with Disabilities Act was clear and unequivocal); *Seminole Tribe*, 517 U.S. at 56-57 (recognizing that Congress provided an "'unmistakably clear' statement of its intent to abrogate" in the Indian Gaming Regulatory Act). The burden on Congress should be the same when and if Congress intends to abrogate state governmental immunity for state law causes of action pursuant to a federal scheme, assuming that Congress has the constitutional authority to do so.

II. Certiorari is not appropriate here because Petitioner's argument already has been addressed and answered, there is no uncertainty concerning *Jackson Transit's* application and the implications of its holding, and Petitioner's proposed application of *Jackson Transit* cannot be reconciled with this Court's constitutional precedent.

A. Certiorari is not warranted here because the Court already addressed and answered Petitioner's argument in *Jackson Transit*.

Jackson Transit is not ambiguous in what it stands for, how it should be interpreted, and the situations to which it properly applies. In *Jackson Transit*, the Court held that Section 13(c) did not "create federal causes of action for breaches of § 13(c) agreements and collective-bargaining contracts between UMTA aid recipients and transit unions," 457 U.S. at 29, and stated that "Congress intended that labor relations between transit workers and local governments would be controlled by state law," *id.* at 24. Since that pronouncement, the state and lower federal courts have taken this Court at its word and have applied state law to claims by transit workers and unions against state transit agencies based on Section 13(c) arrangements. *See, e.g., Burke v. Utah Transit Auth.*, 462 F.3d 1253, 1258 (10th Cir. 2006) (no jurisdiction to consider claims involving Section 13(c) arrangement); *City of Beloit v. Local 643 of the Am. Fed'n of State, County & Mun. Employees, AFL-CIO*, 248 F.3d 650, 653 (7th Cir. 2001) (affirming dismissal for lack of subject-matter jurisdiction); *Greenfield & Montague Transp. Area v. Donovan*, 758

F.2d 22, 25-26 (1st Cir. 1985) (no federal question jurisdiction); *Stockton Metro. Transit Dist. v. Div. 276 of the Amalgamated Transit Union, AFL-CIO*, 183 Cal. Reptr. 24, 28 (Cal. Ct. App. 1982); *Office & Prof'l Employees Int'l Union, Local 2 (AFL-CIO) v. Mass Transit Admin.*, 453 A.2d 1191, 1195 n.4 (Md. 1982); *Finocchi v. Greater Cleveland Reg'l Transit Auth.*, 620 N.E.2d 872, 876 (Ohio Ct. App. 1993); *Amalgamated Transit Union, ATU Local 168 v. County of Lackawanna Transit Sys.*, 678 A.2d 1225, 1230 (Pa. Commw. Ct. 1996) (applying state arbitration law); *City of Madison v. Local 311, Int'l Ass'n of Firefighters, AFL-CIO*, 394 N.W.2d 766, 769 (Wis. Ct. App. 1986) ("Respectable authority exists for the proposition that sec. 13(c) of UMTA does not preempt state law.") (internal citations omitted).

The state and lower federal courts have applied *Jackson Transit* consistently for almost thirty years. They have neither questioned nor expanded upon the *Jackson Transit* holding – that state law, not federal law, governs claims under arrangements and agreements made pursuant to Section 13(c) – and no state supreme court has read *Jackson Transit* to mean that Congress intended to override state governmental immunity in enacting UMTA. In fact, the opinions below – those of the Texas Supreme Court and the Court of Appeals for the Fifth District of Texas – are the *only* opinions that have directly considered Petitioner's novel application of *Jackson Transit*. And even the original ruling of the Court of Appeals for the Fifth District of Texas failed to identify any directly relevant authority when it concluded incorrectly that UMTA preempted state governmental immunity law. *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 173

S.W.3d 896 (Tex. App. - Dallas 2005), *rev'd*, 273 S.W.3d 659 (Tex. 2008).

Still, Petitioner makes the novel assertion that *Jackson Transit* means that Congress *impliedly* preempted state governmental immunity simply because it provided that state law, rather than federal law, would govern the claims of aggrieved parties under Section 13(c) arrangements.[8] However, this Court in *Jackson Transit* did not hold that unions and transit workers could sue state transit agencies in state courts without regard to certain state laws. The holding of *Jackson Transit* and the state supreme and lower federal courts' consistent application of that holding over the last twenty-seven years do not support the reading that Petitioner seeks to ascribe to it. *Jackson Transit's* conclusion answers Petitioner's argument. State law, regardless of form or consequence, applies to claims involving Section 13(c) arrangements.

B. Certiorari is not warranted here because Petitioner's proposed application of *Jackson Transit* cannot be reconciled with this Court's constitutional precedent, and thus Petitioner's concerns are more properly directed to Congress if and when Congress deems state governmental immunity an obstacle to the protection of state transit workers' rights.

Petitioner's proposed application of *Jackson Transit* cannot be reconciled with this Court's constitutional

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[8] Petitioner relies on the Court's dicta, in a footnote, to support its argument. Pet. at 13; *see Jackson Transit*, 457 U.S. at 29 n.13.

precedent. Petitioner suggests that Congress has the authority to preempt, or more appropriately to abrogate, a state governmental entity's immunity from suit *by implication*, and thereby determine the jurisdiction of state courts. Sovereign immunity, whether state sovereign immunity protected by the Eleventh Amendment or state governmental immunity, is an important constitutional principle and a bedrock of our dual system of sovereignty that cannot be eroded by implied congressional intent.[9] Congress does have the power to abrogate the governmental immunity of the States' political subdivisions by creating a federal cause of action, but did not do so in Section 13(c). For the relief that Petitioner seeks, Petitioner must direct its argument to Congress, not to this Court.

Congress is not so unaware of the fundamental principle of state governmental immunity as to require that it be removed by mere implication. UMTA's legislative history is replete with congressional testimony concerning the impact of the Act on transit workers' collective bargaining rights. Knowing surely of both state governmental immunity and threats to workers' rights, Congress affirmatively chose to let state law, rather than federal law, control those rights, subject to agreed-upon Section 13(c) arrangements. *See Jackson Transit*, 457 U.S. at 24.

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[9] Although this is not an Eleventh Amendment case, the requirement that Congress clearly and unequivocally express its intent to abrogate the States' Eleventh Amendment immunity from suit, *see Seminole Tribe*, 517 U.S. at 55 ("Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'") (citing *Blatchford*, 501 U.S. at 786), should apply with equal force when and if Congress intends to abrogate state governmental immunity for state law causes of action brought in state courts, assuming that Congress has the constitutional authority to do so.

The absence of any discussion of, or proposed remedy for, the rights of transit workers in states where governmental entities might be afforded immunity from suit strongly suggests that Congress did not regard immunity from suit as an obstacle to the protection of transit workers' rights. *See Wyeth*, 129 S. Ct. at 1200. The Act's legislative history shows Congress' intent to protect state transit workers' bargaining rights by requiring recipients of UMTA funds to preserve those workers' rights, not to guarantee transit workers a state judicial forum to resolve their disputes regardless of state governmental immunity. Both the legislation itself and the basic structural divisions of our federal system direct Petitioner's concerns to Congress to consider if and when state immunity law poses an obstacle to the achievement of Congress' objectives in enacting UMTA.

III. Certiorari is not appropriate here because Petitioner failed to pursue available administrative remedies.

Granting of certiorari in this case is also inappropriate because Petitioner has failed to pursue available administrative remedies. Petitioner and DART are parties to a Section 13(c) arrangement that the Secretary of Labor has concluded is fair and equitable. *Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 669 (Tex. 2008). As noted by the Texas Supreme Court, DART conceded "that it would not be immune from suit by [Petitioner] to require that the grievance procedures laid out in the Arrangement be fol-

lowed."[10] *Id.* However, Petitioner is not seeking to enforce these procedures. Rather than follow the administrative process outlined in the parties' Section 13(c) arrangement, Petitioner filed this lawsuit seeking money damages. The Texas Supreme Court properly described the administrative process that Petitioner failed to exhaust as follows:

> [A] hearing must be conducted, and if the grievance is not resolved, a fact-finding process ensues. But the end result of that process is an arbitration panel's report and recommendations that are expressly "advisory only" and not binding on either party. The report must be published in the local media, suggesting that the parties' recourse is then through political processes.

Id. at 670.

The Texas Supreme Court properly concluded that Petitioner is seeking to set aside DART's governmental immunity under Texas law to pursue something that neither Section 13(c) nor the parties' Section

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[10] State governmental immunity serves to protect governmental entities from suits for money damages. *See City of Houston v. Houston Firefighters' Relief & Ret. Fund*, 196 S.W.3d 271, 277 (Tex. App. - Houston [1st Dist.] 2006, no pet.). But governmental immunity from suits for money damages does not foreclose all remedies for an aggrieved party. Texas law permits aggrieved parties to initiate actions for certain types of equitable relief against governmental entities, including writs of mandamus, *see M.D. Anderson, Jr. v. City of Seven Points*, 806 S.W.2d 791 (Tex. 1991), and declaratory judgment actions, *see City of Houston*, 196 S.W.3d at 277; *IT-Davy*, 74 S.W.3d at 859-60. However, an aggrieved party cannot "circumvent the doctrine of governmental immunity simply by characterizing a suit for money damages, such as a contract dispute, as a declaratory judgment action." *City of Houston*, 196 S.W.3d at 277; *see IT-Davy*, 74 S.W.3d at 860.

13(c) arrangement gave it, i.e., the right to pursue a lawsuit against DART for money damages. The holding of the Texas Supreme Court does not deprive the Petitioner of the procedural rights described in the parties' Section 13(c) arrangement. Petitioner has simply elected not to pursue those administrative processes.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 7, 2009

No. 08-1173

IN THE

Supreme Court of the United States

AMALGAMATED TRANSIT UNION LOCAL NO. 1338,
Petitioner,

v.

DALLAS AREA RAPID TRANSIT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMALGAMATED TRANSIT UNION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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v.

DALLAS AREA RAPID TRANSIT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF

Amalgamated Transit Union (hereinafter "ATU" or "the International Union"), an international labor organization comprised of 267 affiliated local unions representing employees in the transit industry, primarily bus and train operators and mechanics, files this motion pursuant to Supreme Court Rule 37.2 (b) for leave to file an *amicus curiae* brief in support of Petitioner Amalgamated Transit Union Local No. 1338's Petition for Writ of Certiorari.

On March 27, 2009, ATU sent a letter to all parties in the case, notifying of its intention to file an amicus brief and seeking consent from all parties. On March 31, 2009, Respondent, Dallas Area Rapid Transit (herein "DART"), sent a letter responding that DART "does not consent to" and "opposes the

filing of such a brief," without offering any explanation whatsoever for its opposition. Petitioner Amalgamated Transit Union Local No. 1338 (hereinafter "Local 1338" or "Petitioner") consented to the filing of this brief and its letter of consent has been filed with the Clerk. Since Respondent DART has withheld its consent to the filing of an *amicus curiae* brief, ATU hereby files a Motion for Leave to File Brief in order to file the included *Amicus Curiae* Brief prior to the Court's consideration of the Petition for Writ of Certiorari in this matter.

For the reasons set forth more fully in the statement of interest, ATU is very concerned, on behalf of the overwhelming majority of its members, about the decision of the Texas Supreme Court in this case. This concern is based upon the International Union's representation of tens of thousands of employees throughout the United States whose rights and interest are protected by Section 13(c)[1] arrangements, many of whom could be adversely impacted if the ruling in this case is allowed to stand.

ATU seeks an opportunity to be heard in this matter to present information and perspectives in addition to, and in some respects broader than, those already presented by Petitioner, Local 1338. Because of the International Union's direct interest and involvement in overseeing and administering hundreds of Section 13(c) arrangements and/or collective bargaining agreements reached pursuant to Section

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[1] For simplicity, throughout this motion and the brief, reference will be made to Section 13(c) which was originally enacted as part of the Urban Mass Transit Act of 1964 (UMTA). UMTA is now known as the Federal Public Transportation Act. The employee protection provision of the statute was formerly cited as 49 U.S.C. 1609(c), but is currently codified at 49 U.S.C. § 5333(b).

13(c) arrangements, the decision in the instant case could have a significant and adverse impact on a large number of its members. Accordingly, Amalgamated Transit Union as *amicus curiae* respectfully requests that this motion be granted and its brief accepted and considered in support of the Petitioner's Writ of Certiorari.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR AMALGAMATED TRANSIT UNION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS* [1]

ATU is an international labor organization which has 267 affiliated local unions in the United States and Canada, with an overall membership of more than 189,000 members, including retirees. Of these members, there are approximately 122,000 active

[1] No counsel or party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

members in the United States (153,000 including retirees). These members work primarily in the transit industry and to a large extent are bus and train operators (drivers) and mechanics working in a variety of settings such as for local transit authorities, commercial over-the-road bus operations (*e.g.*, Greyhound) or school bus service providers.

A large number of these affiliated locals represent employees who work for employers that receive Federal Transit Authority ("FTA") money, which requires the employer to reach what is commonly referred to as "Section 13 (c) arrangements" as a precondition to the award of such funding. One of the purposes of these Section 13(c) arrangements is to protect collective bargaining rights which existed prior to the acquisition of privately owned transit companies (with federal funding) by state and local governmental entities. As a by-product of that protection, many of ATU's affiliate locals are parties not only to Section 13(c) arrangements, but also to traditional collective bargaining agreements. Others, like Petitioner, Local 1338, have alternative protections pursuant to Section 13 (c) arrangements which result in employment terms and conditions embodied not in a collective bargaining agreement *per se*, but some kind of "meet and confer" provisions.

These Section 13(c) arrangements can apply whether the members work directly for a public body or for a private sector management company which manages the operation for a public entity, or even for a commercial bus company providing over-the-road services where the employer has obtained federal money to help buy lifts to be ADA compliant. In many of these cases, the arrangement includes a governmental entity as actual party to the arrangement

or that governmental entity has substantial control over the management company which is a party. In each instance, receipt of federal funds is contingent upon entering into a Section 13(c) arrangement to protect, in part, existing bargaining rights and continued funding is contingent upon certification of continued compliance with these requirements.

Throughout the United States, numerous local unions affiliated with the ATU are parties, together with regional transportation authorities, to Section 13(c) arrangements. In the vast majority of affiliated locals, there are 13(c) arrangements and traditional collective bargaining agreements, unlike the instant case where Texas law does not permit public employees to bargain collectively and therefore the arrangement between DART and Local 1338 provides for "meet and confer" procedures to address proposed changes in wages and working conditions, through what is known as a "general grievance." Potentially, in each and every one of these arrangements, or subsequent agreements reached pursuant to these arrangements, where the public entity is in some way a participant, the agreements are put in peril by the decision of the Texas Supreme Court in this case.

ATU is extremely interested in preserving the right to enforce Section 13(c) arrangements and/or agreements reached pursuant to such Section 13(c) arrangements. Since the Supreme Court made it clear in its decision in *Jackson Transit Authority v. Local Division 1285 Amalgamated Transit Union, AFL-CIO-CLC* that such agreements could not be enforced in federal court, in order to fully and effectively address the concerns expressed in the legislative history supporting the basis for Section 13(c), it is imperative that the local unions affiliated with ATU which have

participated in and negotiated Section 13(c) arrangements be able to enforce those agreements in state court. The rights of the workers which Congress originally sought to preserve with Section 13(c) will be "watered down" and exist in name only if there is no effective means to enforce those agreements in courts of the various states. For this reason, ATU seeks to appear as *amicus curiae* in support of Petitioner's petition for writ of certiorari in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982), the Court held that a union does not have a federal cause of action to sue in federal court to enforce the provisions of a "Section 13(c)"[2] arrangement or a collective bargaining agreement negotiated pursuant to such an arrangement against a local transit authority under the Urban Mass Transit Act of 1964, as amended, 49 U.S.C.A. §1609(c) (UMTA).[3]

Jackson Transit Authority taught that any such suit must be filed in state court and under state law. The Texas Supreme Court held in *Dallas Areas Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 2008 WL 5266379 (Tex. 2008), that Texas governmental immunity law is not preempted by Section 13(c) of UMTA and therefore,

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[2] As previously noted, Section 13(c) is no longer actually so designated following the re-codification of the Transportation Code and the relevant provision is now 49 U.S.C. §5333(b). *See* fn. 1 above in Motion for Leave to file Brief.

[3] UMTA is now known as the Federal Public Transportation Act, as amended.

that the local transit authority (in this case, DART) is immune from a breach of contract suit filed by a union in state court regarding an alleged violation of the parties' Section 13(c) arrangements or the resolution agreement reached pursuant to that arrangement.

ATU contends that the Texas Supreme Court's opinion taken in conjunction with the *Jackson Transit Authority* precedent, will open the door, certainly in Texas, but potentially in other jurisdictions as well, to a disturbing result calling into question the enforceability of Section 13(c) arrangements and agreements (including the many collective bargaining agreements to which ATU's affiliates are party). These Section 13 (c) arrangements and agreements which have been developed pursuant to the bargaining or alternative "meet and confer" process preserved through such a Section 13(c) arrangement, will exist in a no man's land where there can be no federal enforcement of such agreements pursuant to *Jackson*, but the alternative mechanism for enforcement that was anticipated as available to parties by the Justices deciding the *Jackson Authority* case would, in fact, not be available in Texas or any other state with similar statutes or constitutional provisions.

Thus, the impact of this Texas Supreme Court decision could be much more widespread than simply with respect to the single resolution agreement reached by Local 1338 and DART pursuant to their meet and confer procedure which is at issue in the instant case. If this decision is allowed to stand, it could result in a vacuum and absence of effective enforcement for many Section 13(c) arrangements throughout the country to which many of ATU's affiliates are parties. Potentially, there is a tremend-

ous impact on the stability of labor relations in a multitude of communities with mass transit systems that receive federal funding.

ARGUMENT

A. Reasons for Granting the Writ.

ATU agrees with Petitioner's arguments as set forth in its asserted reasons for granting the writ and will not restate these in detail here but urges that the writ be granted either because the *Jackson* decision implicitly held that state immunity law is pre-empted, or alternatively, if unresolved, the issue is an important federal question that should be resolved by the Supreme Court with a finding that the Supreme Court of Texas' ruling is repugnant to the Constitution and laws of the United States. ATU fully supports the arguments set forth in Local 1338's petition. As will be addressed in more detail below, ATU seeks to bring to the Court's attention the fact that the ruling of the Texas Supreme Court could potentially affect a much broader group of employees than just the employees of DART.

B. Issues Presented Potentially Have Widespread Impact on Employees Throughout the Country.

ATU desires to file this *amicus curiae* brief in order to set forth, in a broader context, the potential impact of matters raised by virtue of the Texas Supreme Court decision. As noted in the interest of amicus section above, ATU has numerous affiliates in the United States, the vast majority of which have members working for employers that are the beneficiary of financial assistance awarded by the Federal Transit Authority ("FTA"), which requires the employer to

reach Section 13(c) arrangements in order to receive federal funds. Many of ATU's affiliate locals are also parties to traditional collective bargaining agreements. Others, like Local 1338, have alternative protections pursuant to 13(c) arrangements which while not collective bargaining agreements *per se*, provide some protection for preservation of rights and benefits under previous collective bargaining relationships.

Numerous local unions affiliated with the International Union, throughout the United States, are parties to Section 13(c) arrangements, and in many cases, are also parties to traditional collective bargaining agreements. As noted by this Court in *Jackson Transit Authority*, Section 13(c) [now 49 U.S.C. 5333(b)] requires a state or local government to make arrangements to preserve transit workers' rights before that entity can receive federal assistance under the Act. 457 U.S. at 15.

In *Jackson Transit Authority*, the Court reviewed the Congressional intent behind Section 13(c) and acknowledged the concerns that while federal aid was necessary because of the precarious financial condition of many private transportation companies across the country, there was also a concern that public ownership could threaten existing collective-bargaining rights of unionized transit workers employed by private companies. In part to prevent federal funds from being used to destroy these rights, Congress included Section 13(c) which required as a condition of receipt of the funds that the Secretary of Labor certify that "fair and equitable arrangements" have been made to protect benefits under existing collective-bargaining agreements and the continuation of collective-bargaining rights. *Id.* at 17.

Most employers in the public transit industry, who employ members of the majority of the ATU affiliated locals in the United States, receive federal grants from the Federal Transit Authority (FTA) and must, in order to remain eligible for such federal funding, submit annual certifications and assurances to the FTA stating that they acknowledge their compliance with 49 U.S.C. 5333(b). *See* Federal Register, Volume 16, No. 10, at 2458, No. 3, Private Mass Transportation Companies (Jan. 15, 2004).

Pursuant to these many Section 13(c) arrangements, ATU affiliated locals throughout the United States enter into agreements (either traditional collective bargaining agreements or some other type of mutual understanding as with DART and Local 1338). The *Jackson Transit Authority* case made it clear that any Section 13(c) arrangement or collective bargaining agreement negotiated pursuant to such an arrangement could not be enforced in federal court but, instead, and like an ordinary contract, would be enforced in a private suit under state law. 457 U.S. at 20-21.

As noted above, the Supreme Court's opinion in *Jackson Transit Authority* discussed the Congressional history and intent in the passage of UMTA at great length. The Texas Supreme Court's opinion in the instant case is in direct conflict with the *Jackson* decision. In *Jackson*, the Court stated, "Indeed, since Section 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective bargaining agreements between those parties, it is reasonable to conclude that Congress expected the Section 13(c) agreements and the collective bargaining agreements, like ordinary contracts, to be enforceable by private suit upon breach." *Id.* (citations omitted). This was emphasized in foot-

note 13 of the Court's opinion where it stated, "The union, of course, can pursue a contract action in state court. In addition, the Federal Government can respond by threatening to withhold additional financial assistances." *Id.* at fn. 13. Further, in their concurring opinion, Justices Powell and O'Connor added, "Congress here provided for the making of contracts that it must have intended to be enforced." *Id.* at 30 (Powell and O'Connor concurring).

Thus, as is pointed out so clearly by the *Jackson* opinion in the passages cited in the preceding paragraph above, the numerous 13(c) arrangements and the collective bargaining agreements between the parties to those arrangements, the grant recipients and ATU affiliated locals across the country, should be subject to enforcement, as would be any ordinary contract, by private suit upon breach in state courts.

But in the case of the vast majority of the Section 13(c) arrangements and collective bargaining agreements negotiated pursuant to these arrangements, potentially the same issue of enforceability presented here could arise should the ruling of the Texas Supreme Court be allowed to stand. In the first instance, certainly, on its face the Texas Supreme Court's holding will affect any other entity in Texas where there is a Section 13(c) agreement in place, either with a public entity as the sole employer, or as a party to the agreement. Of still greater potential significance, the Texas Supreme Court's holding could have a substantially broader impact as well, since there are other states with similar statutory or constitutional governmental immunity provisions. If the Texas Supreme Court's decision stands, moreover, additional states might undertake to pass governmental immunity provisions in the future. If so,

the 13(c) arrangements and collective bargaining agreements negotiated pursuant to such arrangements in all of those states could fall prey to the same circumstances should there be a breach by the governmental entity.

The Texas Supreme Court concluded that despite *Jackson Transit Authority* and UMTA, there is no preemption of Texas state laws which prevent governmental agencies such as DART from being sued for breach of contract. Therefore, in Texas (and, if the Texas Supreme Court's decision in the instant case is allowed to stand, potentially in any other state with similar statutory or constitutional governmental immunity provisions), if a transit authority breaches a Section 13(c) arrangement or an agreement reached between the parties through collective bargaining negotiations pursuant to a Section 13(c) arrangement, the union could sue the public entity but the suit would be dismissed based upon governmental immunity law. As noted in Local 1338's Petition, the first case reported following the Texas Supreme Court decision in *Dallas Area Rapid Transit v. ATU Local No. 1338*, another DART matter, *Lindsey v. Dallas Area Rapid Transit, et al.*, 2009 WL 453769 (N.D. Tex. 2009)(Civ. Action No. 3:08cv1096, February 23, 2009, Fish), reads the Texas Supreme court opinion in the instant case very broadly.

In all likelihood, it is only a matter of time before other transit authorities, in states where similar governmental immunity statutory provisions are on the books or are later enacted, decide that they too could ignore or breach their Section 13(c) arrangements or the collective bargaining agreements negotiated pursuant to those arrangements with impunity, in light

of the vacuum for enforcement created and suggested by the Texas Supreme Court's decision. If the decision is allowed to stand, the International Union's many affiliated locals which are parties to collective bargaining agreements pursuant to Section 13(c) arrangements with governmental entities throughout the country will be at risk of finding themselves in the same morass in which Local 1338 now finds itself. This quagmire, currently faced by Local 1338, consists of an endless repeating loop of grievance after grievance, after grievance, with no forum to go to for remedial assistance in the face of a breach of its Section13(c) arrangement and its subsequent resolution agreement since *Jackson* teaches a union cannot go to federal court and yet now, apparently, the alternative state court breach of contract claims clearly anticipated by the *Jackson* court can seemingly be defeated by state governmental immunity provisions.

Clearly this is not the situation anticipated by the Court in its *Jackson Transit Authority* decision. Rather, it is clear from that opinion that the roadmap for unions faced with a breach of Section 13(c) arrangements, or the violation of an agreement negotiated pursuant to such an arrangement, was to file a breach of contract claim in state court. The inopposite outgrowth of the Texas Supreme Court decision in the instant case, if allowed to stand, therefore could have a substantial, detrimental impact on many of the members of the locals affiliated with ATU across the country.

CONCLUSION

For these reasons, ATU supports Petitioner's Petition for Writ of Certiorari and respectfully requests that certiorari be granted in this case.

Respectfully submitted,

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